APPELLANT'S BRIEF

20,212 20,213

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,212 and 20,213

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*

v.

ST. LOUIS SOUTHWESTERN RAILROAD COMPANY, *Appellee*

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*

v.

ST. LOUIS SOUTHWESTERN RAILROAD COMPANY
& RALPH T. SEWARD, *Appellees*

On Appeal from Orders of the United States District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Whether a Special Board of Adjustment, which was provided for by the Award of Arbitration Board 282 under P. L. 88-108 to arbitrate that part of the railway labor dispute relating to the consist of crews (other than firemen) which was remanded by the Award of Arbitration Board 282 to local railroad properties for disposition, was required to conduct the arbitration delegated to it in compliance with Sections 7 and 8 and subject to Section 9 of the Railway Labor Act (U.S.C.A., Title 45, Sections 157, 158, 159).

2. Whether the award of a Special Board of Adjustment, created under the Award of Arbitration Board 282 to arbitrate the crew consist issue on one railroad, is valid when it is based in part upon awards made by other Special Boards of Adjustment in the arbitration of the crew consist issue on other railroads notwithstanding consideration of awards on other railroads was not one of the "guidelines" prescribed by the Award of Arbitration Board 282 for the arbitration of the crew consist issue by Special Boards of Adjustment.

3. Whether the award of a Special Board of Adjustment, created under the Award of Arbitration Board 282 to arbitrate the crew consist on one railroad, is valid when it is based in part upon agreements made with respect to the crew consist issue on other railroads notwithstanding consideration of agreements disposing of the crew consist issue on other railroads was not one of the "guidelines" prescribed by the Award of Arbitration Board 282 for the arbitration of the crew consist issue by Special Boards of Adjustment.

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APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

Public Law 88-108, Act of August 28, 1963, 77 Stat. 132, U.S.C.A., Title 45, Sec. 157 (1965 Supp.) required the arbitration of two issues of the National Railway Labor dispute pursuant to Sees. 7 and 8 of the Railway Labor Act,

U.S.C.A., Title 45, Secs. 157 and 158 and designated the United States District Court for the District of Columbia as the Court in which the Award of the Arbitration Board was to be filed. The Award of said Arbitration Board was filed in said Court and the Court entered judgment thereon as provided in 45 U.S.C.A., Sec. 159 (J.A. 59-60). *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Certain Carriers represented by the Eastern et al., Conference Committees*, 118 App. D.C. 100, 331 F. 2d 1020, affirming 225 F. Supp. 11 (D.C.D.C. 1964), cert. den. 377 U.S. 918, 84 S. Ct. 1181 (April 27, 1964).

On January 20, 1966, Arbitration Board 282 filed in Misc. No. 41-63 in the United States District Court for the District of Columbia its rulings upon and answers to BRT Question 47 (J.A. 38, 94) which involved disputes between the BRT and the St. Louis Southwestern Railroad Company.

On January 26, 1966, the BRT filed in the U.S. District Court for the District of Columbia a petition in Civil Action No. 201-66 to impeach the rulings of and answers by Arbitration Board 282 on January 20, 1966, with respect to BRT Question 47 (J.A. 38).

On January 27, 1966, the Brotherhood of Railroad Trainmen filed in Misc. No. 41-63 in the District Court in which the Award of Arbitration Board 282 and its subsequent rulings in answer to questions submitted to it were filed a petition to impeach and contest the rulings of Arbitration Board 282 in answer to BRT Question 47 (J.A. 38).

On March 29, 1966, the District Court entered an order consolidating the petitions to impeach certain rulings of Board 282 on BRT Question #47 (J.A. 39-40, 95).

On April 22, 1966, the District Court dismissed the consolidated petitions. (J.A. 92).

On April 27, 1966, the Brotherhood of Railroad Trainmen filed its notice of appeal to this Court from the April

22, 1966 order of the District Court and those appeals were designated in this Court as Numbers 20,212 and 20,213. (J.A. 93-94).

On June 6, 1966 this Court ordered the aforesaid appeals in Nos. 20,212 and 20,213 consolidated for disposition in this Court.

The jurisdiction of this Court is predicated on U.S.C.A., Title 28, Sec. 1291.

STATEMENT OF THE CASE

This is an appeal from a decision of the District Court affirming the rulings of Board 282 made in response to questions submitted for interpretation of the original Award. The question was numbered before the Board as BRT Question 47.

GENERAL BACKGROUND

The general background of this case appears from the opinions of the courts in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963), affirming 310 F. 2d 503 (7th Cir. 1962); *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Certain Carriers*, 118 App. D.C. 100, 331 F. 2d 1020 (D.C. Cir., 1964), affirming 225 F. Supp. 11 (D.C.D.C., 1964), cert. den., 377 U.S. 918, 84 S. Ct. 1181 (1964).

On November 2, 1959 substantially all the railroads in the United States, acting under Sec. 6 of the Railway Labor Act (U.S.C.A., Title 45, Sec. 156), served upon the organizations representing their employees engaged in train and yard service, a notice proposing to abolish all contract provisions and all practices and interpretations which required a stipulated number of employees in a crew in road and yard service.

On September 7, 1960 the organizations, acting under Sec. 6 of the Railway Labor Act, served upon the carriers

a notice proposing national contract provisions requiring that each crew consist of a minimum of a conductor or foreman and two brakemen or helpers.

The parties were unable to resolve the dispute and in the summer of 1963 a strike was imminent over the carriers' threat to put their notices in effect. In order to avoid a strike, Congress enacted P.L. 88-108; 77 Stat. 132; U.S.C.A., Title 45, Sec. 157 (Supp. 1965) which was approved August 28, 1963 providing for "final disposition" of the dispute by compulsory arbitration of the "crew consist issue" by an arbitration board which became known as "Arbitration Board 282".

The Award of Arbitration Board 282 remanded the basic dispute for local negotiations and prohibited any change except in accordance with interim procedures it prescribed for changing pre-existing contract rules. This was by notice from one side to the other, negotiations, and in the absence of agreement, by an arbitration award by a Special Board of Adjustment for which it provided, to be made in accordance with guidelines prescribed by Board 282. (J.A. 53 et seq.).

THIS CASE

On February 25, 1964, the St. Louis Southwestern Railroad Company served a notice on the Brotherhood of Railroad Trainmen proposing a reduction in the minimum number of persons required by the collective bargaining agreement to be in sixteen crews. (J.A. 12).

On March 25, 1964 and April 1, 1965 the Brotherhood of Railroad Trainmen served counter notices on the St. Louis Southwestern Railroad Company proposing an increase in the minimum number of persons to be in those and four other crews. (J.A. 7, 12-15). When conferences did not result in an agreement, the railroad, on May 12, 1964, referred the dispute to a Special Board of Adjustment and designated M. L. Erwin, its Manager of Personnel, to be

its member of the proposed Special Board. (J.A. 8, 19-20) The Brotherhood of Railroad Trainmen objected to a Special Board being convened because negotiations had not been completed and it had not been settled as to what jobs would have firemen on them in order to give effect to one of the "guidelines" for determining the crew consist issue. (J.A. 8, 17-18).

On May 22, 1964, the National Mediation Board named Frank Elkouri to be the neutral member and R. J. Roberts, Appellant's General Chairman on the St. Louis Southwestern Railroad Company, to be the employee member of a Special Board of Adjustment provided for by the Award of Arbitration Board 282. (J.A. 8, 20-22).

On May 26, 1964, the neutral member of that Board, Frank Elkouri, advised the carrier member of the Board, M. L. Erwin, and R. J. Roberts, the employee member of the Board, that the Board would convene and hearings would commence on June 15, 1964 in the railroad's office in Tyler, Texas (J.A. 8, 23).

On May 27, 1964 R. J. Roberts, the employee member of the Special Board, advised the neutral member of the Board, Frank Elkouri, and the carrier member of the Board, M. L. Erwin, that Appellant's General Grievance Committee for the St. Louis Southwestern Railroad Company did not have funds with which to share the expense of the Special Board and requested the carrier member to join in a request to the National Mediation Board for it to pay the expenses of the neutral member and any incidental expenses of the Special Board. (J.A. 9, 24-25, 41-42).

On June 3, 1964, M. L. Erwin, the railroad's member of the Special Board, refused to join in the suggested request of the National Mediation Board. (J.A. 9, 26-27, 41-42).

The National Mediation Board was advised of the position of the Brotherhood of Railroad Trainmen and of the suggested request to be made of it to provide funds by a

copy of R. J. Robert's letter to M. L. Erwin and Frank Elkouri. (J.A. 24-25, 27-28).

On June 10, 1964, Appellant's General Chairman Roberts, the employee member of the Special Board, by a letter to Frank Elkouri, the neutral member of the Board, and M. L. Erwin, the Carrier member of the Special Board, objected to the Board proceeding "except and unless" the "proceedings of the Board are handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make a transcript of all proceedings and take evidence under oath and to mark all exhibits with a number and enter them in evidence, so that the award or awards of the Board will be subject to review under Section 9 of the Railway Labor Act." Appellant's member of the Special Board, R. J. Roberts, further objected to the Board's hearings being in the railroad's offices as directed by the neutral member of the Board and demanded that the hearings be in the Federal Building in Tyler, Texas, as provided in Section 7(g) of the Railway Labor Act. (J.A. 9, 27-29).

The demand of Appellant's General Chairman Roberts for the Board's hearings to be in the Federal Building in Tyler, Texas, as provided in Section 7(g) of the Railway Labor Act, was sustained by the Board but the neutral and carrier members of the Special Board overruled the demand or request for it to proceed in compliance with provisions of Sections 7 and 8 of the Railway Labor Act. However, the neutral member of the Special Board authorized either party to make a transcript of the proceedings if it wanted to do so. (J.A. 9, 27-29).

On June 15, 1964, without waiving the position of the Brotherhood of Railroad Trainmen that the proceedings of the Special Board, in order to be legally proper, must be conducted in accordance with Sections 7 and 8 of the Railway Labor Act, in order that any award of the Board could be meaningfully reviewed in accordance with Section 9 of

the Railway Labor Act, and denying that any other procedure was legally proper, Appellant's member of the Board requested the carrier to furnish him with a full statement of the facts and all supporting data bearing upon the dispute to be heard by the Board and that he be given an opportunity to prepare an answer to such statement and supporting data as is the practice before the National Railroad Adjustment Board under Section 3 of the Railway Labor Act. That request was complied with by the carrier member of the Board. (J.A. 29-30, 42-43).

The neutral and carrier members of the Special Board made an award for the Board on July 14, 1965 at St. Louis, Missouri denying the proposal of the Brotherhood of Railroad Trainmen and sustaining, in its entirety, the proposal of the carrier. (J.A. 9, 30-31). The award of the Board authorized a reduction by one switchman or brakeman in the number of persons required to be employed in sixteen crews. (J.A. 12).

The award recites that it was made "on the basis of all relevant evidence submitted by the parties, including awards of other Special Boards created under the Award of Arbitration Board 282, and the agreement reached between the Brotherhood and the C.R.I. & P. Railroad on June 17, 1964 (relating to the crew consist issue)." (J.A. 30-31).

The written "submission", which was a written argument by the carrier of about one hundred pages, was submitted to the Special Board by the carrier on the first day it convened. (J.A. 43, 49). In Exhibit "A" to the written submission or argument the carrier directed the attention of the Special Board to the awards of Special Boards of Adjustment on other railroads. Three of them were on the Missouri Pacific Railroad and Texas & Pacific Railway, the validity of which are involved in *Brotherhood of Railroad Trainmen*, Appellant v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co., et al.*, Appellees, Nos. 19,867,

20,003 and 20,004 in this Court. The award on the Missouri Pacific was copied in full. It established a minimum crew of two brakemen on main line local trains, and one helper in yards, which was what had been proposed by the St. Louis Southwestern Railroad Company for main line locals and its Illmo yard and was allowed by the award of the Special Board. (J.A. 12, 31, 45-46).

The railroad claimed in the District Court that the awards of those other Special Boards were placed before the Special Board by *both* the railroad and the Brotherhood as their "Joint Exhibit No. 7". (J.A. 43). The employee member of the Board denied the claim of the railroad that the awards were a "joint exhibit", stating that they were marked as "Joint Exhibit No. 7" by the neutral member of the Board to distinguish them from exhibits which had been prepared by one of the parties and which were truly partisan and that the Brotherhood continually objected to them being considered as relevant evidence of the number of men needed in crews on the St. Louis Southwestern Railroad. (J.A. 49-50). The railroad does not dispute the denial of its prior claim that the exhibit was a "Joint Exhibit" but now claims that General Chairman Roberts, the employee member of the Board, used them to support his argument to the Board that it should make "on-the-ground" observations of the work done by the crews in question. (J.A. 52).

The report of the terms of an agreement with respect to the consist of crews between the Chicago, Rock Island & Pacific R. Co. and the Brotherhood, which was contained in an article in "Trainmen News", was placed before the Special Board by the carrier and there is no claim that it was "Joint Exhibit". (J.A. 43). It reported that the agreement established a minimum crew of two brakemen on main line trains, which was what the railroad was seeking and got from the Special Board in this case. (J.A. 12, 31, 47). The railroad's claim that no objection was

made to the Board considering that evidence was denied by the employee member of the Board, who stated that the report of the agreement was offered by the carrier as "Carriers' Exhibit 17a" while the Special Board was meeting in St. Louis, that he objected to it being considered, and that the neutral member of the Board stated to him that it caused him to change his mind about reductions in either several or seven crews and that he, the neutral, was going to permit the reduction proposed by the railroad. (J.A. 43-44, 51).

On January 16, 1966, Arbitration Board 282 answered and ruled upon BRT Question #47. It was: "Is the award of the Special Board of Adjustment (St. Louis Southwestern Railway Co.) valid, considering each of the following and if not, by reason of which of the following: (a) The refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to provide and pay the expense necessary for the making of a transcript of the proceedings and of the evidence offered to and received by such Special Board of Adjustment and the refusal of such board to grant the request or demand of the Brotherhood of Railroad Trainmen for it to proceed only in accordance with Section 7 of the Railway Labor Act to the extent of taking testimony under oath and making and certifying a transcript of its proceedings and of the evidence and papers presented to it, and (b) Basing its award partly upon the 'awards of other special boards created under the award of Arbitration Board 282', and (c) Basing its award partly upon 'the agreement reached between the Brotherhood and the C.R.I. & P. Railroad on June 17, 1964 (relating to the crew consist issue).'" (J.A. 3-4, 77-78)

The answer to the question and ruling by the Board was: "There is no basis for concluding that the Award of the Special Board of Adjustment is invalid for the reasons

referred to in the question. See the Board's Preliminary Statement and its answers to B.R.T. Questions 32, 33 and 36." (J.A. 3-4, 78)

The Board's preliminary statement, insofar as it relates to BRT Question 36 B(1) (2) and (C) and its ruling and answer to that question are relevant here and appear in full on pages 66-76 of the Joint Appendix. The validity of the Board's ruling and answer to that Question are involved in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., et al.*, Nos. 19,867, 20,003 and 20,004 in this Court.

BRT Question 36 (B) (1), (2) and (C) were whether Special Boards of Adjustment were required to comply with the procedure established by §§ 7 and 8 of the Railway Labor Act requiring evidence to be taken under oath and a transcript to be made of the proceedings of the board and of the evidence taken by it notwithstanding the absence and non-participation in the proceedings of the board by one of the partisan members, and whether the awards of the Special Boards of Adjustment were substantially in conformity with those sections of the Railway Labor Act since it was admitted that the Special Boards did not comply with those procedures. (J.A. 73-75)

The Board's answer was that the Special Boards of Adjustment were not required by the terms of the Award of Arbitration Board 282 to adhere to the procedures prescribed in either Section 7 or Section 8 of the Railway Labor Act. (J.A. 66, 70, 75)

The two "organization members" of Arbitration Board 282 dissented to the ruling and answer by the Board with respect to its Answers to BRT Question 36. (J.A. 166-174)

This case presents a different situation from that which was involved with respect to the Special Boards that were the subject of BRT Question No. 36 in that, in this case, Appellant did participate in negotiations prior to the Spe-

cial Board being convened, demanded that the Special Board proceed in accordance with Sections 7 and 8 of the Railway Labor Act and make a transcript of its proceedings and of the evidence heard by it in order that a meaningful review of its award would be possible which demand was overruled by the neutral and carrier members of the Board, and Appellant did participate in the proceedings of the Board with the objection that the procedures required by Sections 7 and 8 of the Railway Labor Act should be followed. Also, BRT Question No. 36 was not concerned with the validity of the award of a Special Board based in part upon awards of Special Boards of Adjustment on other railroads and upon an agreement made between the Brotherhood and another railroad with respect to the crew consist issue.

STATUTES AND REGULATIONS INVOLVED

Statutes and regulations involved are appended hereto in the Appendix, *infra*.

STATEMENT OF POINTS

I

The District Court erred in refusing to impeach the ruling by Arbitration Board 282 that the Special Boards of Adjustment for which it provided in its Award and to which it delegated most of the arbitration required by Public Law 88-108 were not required to comply with any procedure established by the Railway Labor Act. P.L. 88-108 required the arbitration to be conducted pursuant to Sections 7 and 8 and to be subject to Section 9 of the Railway Labor Act.

II

The District Court erred in refusing to impeach the ruling by Arbitration Board 282 that a Special Board of Adjustment for which it provided in its Award and to which

it delegated most of the arbitration of the crew-consist issue which was required by P.L. 88-108 to be arbitrated. The arbitration conducted by such Special Board is subject to Section 9 of the Railway Labor Act which requires the impeachment of the Award of an arbitration board which does not comply with the procedures required by Sections 7 and 8 of the Railway Labor Act in conducting the arbitration.

III

The District Court erred in refusing to impeach the ruling by Arbitration Board 282 that the Special Boards of Adjustment for which it provided in its Award and to which it delegated most of the arbitration required by P.L. 88-108 were not required to make a transcript of the evidence heard by it. A party aggrieved by the Award of a Special Board of Adjustment is entitled to a meaningful review thereof, in the first instance by Arbitration Board 282 and thereafter, under Section 9 of the Railway Labor Act, by the courts, and no such review is possible in the absence of a transcript of the evidence which it was the duty of the Board to provide.

IV

The District Court erred in refusing to impeach the ruling by Arbitration Board 282 that a Special Board of Adjustment for which it provided in its Award and to which it delegated most of the arbitration required by Public Law 88-108 was not required to make and certify a transcript of its proceedings and of the evidence heard by it as required by Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act. Such ruling raises serious questions as to whether a party aggrieved by the Award of such Special Board of Adjustment has been deprived of property without due process of law, which constitutional questions would be avoided by construing P.L. 88-108 to require the impeachment of the Award of a Special Board

of Adjustment and by the impeachment of the ruling by Arbitration Board 282 approving the Award of a Special Board of Adjustment where such Special Board of Adjustment did not make and certify a transcript of its proceedings and of the evidence heard by it, so that a meaningful review of its Award could be possible.

V

The District Court erred in refusing to impeach the ruling by Arbitration Board 282 that the Award of a Special Board of Adjustment was valid although based upon the awards of Special Boards of Adjustment on other railroads.

VI

The District Court erred in refusing to impeach the ruling by Arbitration Board 282 that the Award of a Special Board of Adjustment was valid although based upon the provisions of an agreement between Appellant and another railroad with reference to the consist of crews on that other railroad.

SUMMARY OF THE ARGUMENT

Public Law 88-108 provided for the compulsory arbitration of the crew-consist issue pursuant to the procedure established by Sections 7 and 8 of the Railway Labor Act and made such arbitration subject to Section 9 of the Railway Labor Act, which provides for the impeachment of the Award of an Arbitration Board which did not conduct its proceedings as required by Sections 7 and 8 of the Railway Labor Act.

The Arbitration Board, for which Congress provided, delegated the arbitration of most of the crew-consist issue to Special Boards of Adjustment for which it provided because it became apparent that the crew-consist issue properly could not be arbitrated on a national, but only upon a local, basis because of the different and varying circum-

stances affecting individual crews and it provided guidelines to govern the arbitration to be conducted by such Special Boards of Adjustment, but it did not prescribe the procedure to be followed by such Special Boards in conducting the arbitration.

The Special Board of Adjustment expressly refused to follow the procedure required by Sections 7 and 8 of the Railway Labor Act for the making of a transcript of the evidence heard by it and upon the basis of which it made its award without which a meaningful review of its Award by Arbitration Board 282 and thereafter by the courts under Section 9 of the Railway Labor Act, to which an aggrieved party to such an Award is entitled, is impossible.

It was the duty of the Special Board of Adjustment, *sua sponte*, to make and certify a transcript of the evidence heard by it.

Public Law 88-108 and Section 9 of the Railway Labor Act require the impeachment of the Awards of Special Boards of Adjustment and of a ruling by Arbitration Board 282 upholding the Award of such Special Board of Adjustment, where, as in this case, such Special Board of Adjustment did not make a transcript of the evidence heard by it as required by P.L. 88-108 and Section 7 of the Railway Labor Act. The denial of a meaningful review of the Award of a Special Board of Adjustment either by Arbitration Board 282 or by the Courts under Section 9 of the Railway Labor Act because of the absence of a transcript of its proceedings and of the evidence heard by it would raise a substantial question as to whether a party to the award of such Special Board of Adjustment was deprived of property without due process of law which question does not arise if Public Law 88-108 is construed to require the impeachment of rulings by Arbitration Board 282 upholding the awards of Special Boards of Adjustment which did not comply with the procedural requirement of Section 7 of the Railway Labor Act to the extent of making a record

of the evidence heard by it so that a meaningful review thereof could be had.

The guidelines established by Arbitration Board 282 for the disposition of the crew consist issue by Special Boards of Adjustment do not authorize a Special Board of Adjustment to base an award upon the awards of Special Boards of Adjustment made in the arbitration of the crew consist issue on other railroads nor do they permit a Special Board of Adjustment to base an award upon an agreement with respect to the consist of crews on other railroads.

ARGUMENT

I

The Ruling of the Court Below and the Position of Board 282, Concerning the Procedure To Be Followed by Special Board, Are Contrary to the Earlier Statements of Position by Them

The position taken by Arbitration Board 282 and by the District Court for the District of Columbia with respect to the procedure to be followed by Special Boards of Adjustment has changed. Both of them now take the position that the Special Boards are not subject to any procedure established by the Railway Labor Act or Public Law 88-108.

On May 21, 1964 the Brotherhood of Railroad Trainmen submitted its Question number 21 to Arbitration Board 282. It was as follows:

> "Is our understanding correct that special boards of adjustment established pursuant to the award of Arbitration Board 282, Section III, Part B, having no procedure stipulated by agreement, must therefore conduct their arbitration pursuant to Sections 7 and 8 of the Railway Labor Act, to the extent that said sections are not inconsistent with Public Law 88-108, and that the awards of those special boards are subject to Section 9 of the Railway Labor Act?"

(page 11, Brief for Appellees, in number 18,845 in this Court. Decided June 24, 1965, 121 App. D.C. 230; 349 F. 2d 207)

Although Arbitration Board 282 ruled upon and answered the questions submitted to it with respect to the meaning or application of its award on May 22, 1964 and June 9, 1964 it did not answer BRT Question number 21 until September 16, 1964, as will be noted later.

On June 8, 1964 the District Court for the District of Columbia in *In Re Certain Carriers*, 231 F. Supp. 519, denied a motion for supplementary relief which had been filed by the Brotherhood after the United States District Court for the Eastern District of Missouri on May 28, 1964 had dismissed, for lack of jurisdiction, an action brought by the Brotherhood on May 11, 1964 seeking a declaratory judgment that the awards of Special Boards were void because the Boards had not proceeded in accordance with §§ 7 and 8 of the Railway Labor Act and for an injunction to prevent the railroads from putting the awards into effect. *Brotherhood of Railroad Trainmen* v. *Missouri Pacific Railroad Co., et al.*, 230 F. Supp. 197 (E.D. Mo., 1964).

The District Court in Missouri had expressed the opinion on May 28, 1964, 230 F. Supp. l.c. 201:

> "• • • for our purposes the authority of the Local Board, its procedure, its findings and award, stemming as they do from Award 282 must be deemed to be a part of and embraced by Award 282, subject for its interpretation and application by reference to Board 282 as provided for by 45 U.S.C.A. Sec. 157 (c), 158 (m); such additional interpretations and applications of its award by Board 282 being judicially reviewable by 45 U.S.C.A. Sec. 159 in the District Court of the District of Columbia under Public Law 88-108."

However, the District Court for the District of Columbia on June 8, 1964 ruled, 231 F. Supp. l.c. 521:

> "To be sure, the provisions of the Railway Labor Act, found in 45 U.S.C. §§ 158, 159, were binding on the

> special Board of Arbitration created by the Act of Congress, and those provisions were complied with. The Court is of the opinion, however, that they are not applicable to the special boards of adjustment created under the award.
>
> "These special boards are creatures of the Arbitration Board and not of any statute. The nearest analogy to these boards is the National Railroad Adjustment Board, which sits in regional divisions. By analogy, it would seem to follow that the procedure prescribed for the divisions of the Adjustment Board should be applicable to the special adjustment boards created under the award and this Court so holds.
>
> "The procedure prescribed by the statute governing these boards is found in subsections (i), (j) and (m) of 45 USC § 153. • • • "

While the appeal from the ruling of the District Court for the District of Columbia was pending in this Court (*Brotherhood of Railroad Trainmen* v. *Certain Carriers*, No. 18,845, 121 App. D.C. 230, 349 F. 2d 207), Arbitration Board 282 answered BRT Question 21 as follows:

> "The Board declines to answer this question and refers the parties to the holdings on this question by Judge Holtzoff as stated in his Opinion issued June 8, 1964, in the matter designated as Miscellaneous No. 41-63 issued June 8, 1964, in the United States District Court for the District of Columbia."

(page 11, Brief for Appellees, in number 18,845 in this Court, decided June 24, 1965, 121 App. D.C. 230, 349 F. 2d 207)

On August 4, 1965 in pursuance of the decision of this Court on April 15, 1965 in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 120 App. D.C. 299, 345 F. 2d 985 (which expressed the same opinion as had been expressed by the District Court in Missouri with reference to reviewability of Special Board awards under Section 9 of the Railway Labor Act) and of

the appeal in *Brotherhood of Railroad Trainmen* v. *Certain Carriers*, No. 18,845, 121 App. D.C. 230, 349 F. 2d 207, the Brotherhood submitted its question 36 to Board 282. It was in part the same as its question 21, previously mentioned. (J.A. 65, 73-75).

In its answer to BRT Question 36, upon which Arbitration Board 282 predicated its answer to BRT Question No. 47, which is involved here (J.A. 78), Arbitration Board 282 abandoned the inference in its response to BRT Question 21, that the procedure provided by Section 3 of the Railway Labor Act was applicable to Special Boards as held by the District Court on June 8, 1964. It *now* rules that neither that procedure nor any other procedure established by the Railway Labor Act is applicable to Special Boards. (J.A. 66-70, 75, 77-78).

The District Court for the District of Columbia has changed its opinion from that expressed on June 8, 1964 that the procedures prescribed by Section 3 of the Railway Labor Act were applicable to Special Boards. On January 12, 1966 the District Court held that "the provisions of the Railway Labor Act are not applicable to the Special Boards of Adjustment". *In Re Certain Carriers*, 248 F. Supp. 1008, 1012 (D.C.D.C., 1966). It followed that ruling in this case on April 22, 1966. (J.A. 89-92) (But, contra, 231 F. Supp. 519, particularly that part of the Opinion which appears, 231 F. Supp. 519, 521, which was omitted from the part of the Opinion quoted, 248 F. Supp. 1012 and which has to do with the applicability of the procedures prescribed in Section 3 of the Railway Labor Act).

Thus, according to the ruling by Arbitration Board 282 and by the District Court, the Special Boards of Adjustment are not required to follow any procedure established by the Railway Labor Act or elsewhere but are free agents to proceed in any way that might appeal to their whim or caprice and are not responsible to any authority in doing so.

II

The Ruling of Board 282, Sustained Below, That the Special Boards Need Not Conduct Their Arbitration Substantially in Conformity With Sections 7 and 8 of the Railway Labor Act Conflicts With Public Law 88-108 and With the Decisions of This Court

Arbitration Board 282 remanded to the local properties the issues concerning the consist of crews and provided for interim determination either by agreement or by arbitration through Special Boards of Adjustment. This did not apply to main line freight crews where the crew consist had theretofore been established as a conductor and two brakemen, which crews were not subject to change. (J.A. 53 et seq.).

It is undeniable that the Special Boards were empowered to decide the issues which Congress had legislated for decision by Board 282, and these Special Boards were in fact completing the work of Board 282. Public Law 88-108 expressly declares the provisions of Secs. 7, 8, and 9 of the Railway Labor Act applicable to the arbitration therein provided for.

In Sec. 4 of Public Law 88-108, Congress provided that:

> "To the extent not inconsistent with this joint resolution *the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act*, the Board's award shall be made and filed as provided in said sections *and shall be subject to section 9 of said act*. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed. * * * " (Emphasis added)

This Court, in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 120 App. D.C. 299; 345 F. 2d 985, made it clear that section 9 of the Railway Labor Act, U.S.C.A., Title 45, § 159, does apply to the awards of Special Boards of Adjustment. The Court ruled (as did the District Court in Missouri) that

Special Board awards are subject to review by the courts under section 9 of the Railway Labor Act after review by Arbitration Board 282. In so ruling, this Court said, 345 F. 2d l.c. 987:

> "Congress did not foresee that Board 282 would refer issues to Special Boards, and thus made no explicit provision for appeals from these Boards. But Congress entrusted the work-rules dispute to Board 282 for 'complete and final disposition.'
>
> "The Board's delegation of the crew consist issue to Special Boards should not mean that such boards and in particular their single neutral members, could settle a dispute by compulsory arbitration without being subject to any meaningful review. Unless a tribunal familiar with the work-rules dispute interposes its judgment, with its reasons, between the Special Board's award and judicial review, no meaningful review will be available to an aggrieved party. Moreover, there are statutory limitations on the scope of our reviews and on our authority to prescribe flexible remedies. These limitations need not bind Board 282. * * * "

In amplification of the statements with respect to the limitations upon the scope of review and upon authority to prescribe flexible remedies, this Court also said in footnotes 5 and 6:

> "5. Congress limited judicial review to the grounds for impeachment of an arbitration award under the Railway Labor Act, 45 USCA section 159: that the award does not conform 'to the substantive [or procedural] requirements' of the statute or to 'the stipulations of the agreement to arbitrate' or that the award was vitiated by fraud.
>
> "'The court may not review the question whether there is substantial evidence to sustain the findings of fact. * * * (T)he scope of review * * * is much narrower than that which generally prevails in connection with administrative decisions.' Brotherhood of Locomotive Firemen & Enginemen v. Chicago, B. & Q. R. Co., supra, 225 F. Supp. at 18.

"6. See 45 USC Section 159, Fourth, incorporated by reference into Public Law 88-108, supra, note 1."

U.S.C.A., Title 45, Sec. 159, Fourth, to which the Court referred in footnote 6, provides that:

"If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, * * * the court shall set aside the entire award. * * *"

Thus, although under section 9 of the Railway Labor Act, courts may not determine the question of whether there was substantial evidence to sustain the findings of Special Boards, they may determine whether the award of the Special Board conforms to the "substantive" and "procedural" requirements of the Railway Labor Act.

Section 9, Third, of the Railway Labor Act, which was summarized by this Court in the *Milwaukee* case, *supra*, footnote 5, provides that one of the grounds for impeachment of the award of an Arbitration Board is:

"(a) * * * that the proceedings were not substantially in conformity with this chapter; * * *"

Section 7, Third, (h) provides that:

"All testimony before said board shall be given under oath * * *."

Section 7, Third (f) provides that:

"The Board of Arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the Clerk of the District Court of the United States * * * to be filed in said Clerk's office * * *. The said Board shall also furnish a certified copy of its award and the papers and proceedings, including testimony relating thereto, to the Mediation Board * * *."

Section 8 (k) is to the same effect.

It is hardly credible that Congress in Public Law 88-108, in prescribing compulsory arbitration of the crew-consist issue in accordance with the procedures of Sections 7 and 8 of the Railway Labor Act, meant only that these provisions should be applicable to the board Congress established, and meant that if that board delegated part of the arbitral process, its delegee could conduct its part of the arbitral process without such limitations.

Appellant demanded that the procedure required by Sec. 7 (h) and (f) of the Railway Labor Act, U.S.C.A., Title 45, Sec. 157 (h) and (f) be followed but the Special Board here involved refused to follow that procedure (J.A. 27-29, 42). Section 4 of P.L. 88-108 and Section 9, Third (a) of the Railway Labor Act require the impeachment of the Awards of the Special Boards and the ruling of Arbitration Board 282 approving them.

III

The "Interpretation" by Arbitration Board 282 That the Special Board of Adjustment Was Not Required To Conduct Its Part of the Arbitration in Accordance With the Procedures of Sections 7 and 8 of the Railway Labor Act to the Extent of Making and Certifying a Transcript of Its Proceedings and of the Evidence Would, If Sustained, Deprive a Party Who Becomes Aggrieved by the Award of Such Special Board of a "Meaningful Review", to Which Review This Court Held He Is Entitled

In the *Milwaukee* case, *supra*, 345 F. 2d 985, 987 this Court said:

> "Congress did not foresee that Board 282 would refer issues to special boards, and thus made no explicit provisions for appeals from these boards. But Congress entrusted the work-rules dispute to Board 282 for 'complete and final disposition'. The Board's delegation of the crew consist issue to special boards should not mean that such boards, and in particular their single neutral members, could settle a dispute

> by compulsory arbitration without being subject to any meaningful review. Unless a tribunal familiar with the work-rules dispute interposes its judgment, with its reasons, between the special board's award and judicial review, no meaningful review will be available to an aggrieved party."

Meaningful review of the Award of a Special Board of Adjustment by Arbitration Board 282 and judicial review thereafter under § 9 of the Railway Labor Act is not possible in the absence of a record of the proceedings and of the evidence as provided for and required by Section 4 of Public Law 88-108 and §§ 7 and 8 of the Railway Labor Act and which Appellant demanded and sought to obtain but which the Special Board refused (J.A. 24-30, 42).

The reasons for the refusal of Arbitration Board 282 to make a national rule as to crew consist (although making an interim national rule disposing of the fireman issue) and for rejecting the carriers' proposal to eliminate all rules requiring a stipulated number of persons in crews, and for remanding the crew-consist issue to the individual properties for negotiations and interim agreements or for arbitration by Special Boards of Adjustment according to guidelines established by Board 282, was stated by the neutral members of Arbitration Board 282, in their opinion, filed with the Board's Award as follows:

> "* * * The size of road and yard crews * * * has never been the subject of a national rule in the railroad industry. * * *
>
> "* * * Some yard service crews, for example, now consist of one foreman and one brakeman, while others consist of one foreman and as many as ten brakemen. The variations depend on a great complex of factors, reflected by the guidelines mentioned below. Though the range is less pronounced in road service, it also makes unfeasible a definitive national rule * * *.
>
> "It is apparent to us that the consist of crews necessary to assure safety and to prevent undue workloads must

> be determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic. * * *" (41 Labor Arbitration Reports 693-694)

The neutral members of Arbitration Board 282 also noted that:

> "In their argument the carriers point out that 'operating conditions, operating methods and service requirements vary greatly from railroad to railroad, from division to division and from yard to yard on the same railroad, and, over significant periods of time, on the same division and in the same yard'. * * *" (41 Labor Arbitration Reports 694)

The District Court and this Court recognized the necessity for the crew-consist issue to be determined locally and on the basis of individual crews in the action to impeach the Award of Arbitration Board 282. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, l.c. 20, affirmed 118 U.S. App. D.C. 100, 331 F. 2d 1020.

The "guidelines" established by Arbitration Board 282 (J.A. 56 et seq.) provided "general considerations" such as "assurance of adequate safety"; "avoidance of unreasonable burden or workload"; "physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions)"; "the number of highways, streets, road or other crossings or intersections to be protected"; "state, county or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersection"; "availability and use of communication equipment (such as, but not limited to, end-to-end train radio; train to wayside radio and walkie talkies)"; "the presence or absence of a fireman in the engine service crew". In addition to the general considerations it established "particular considerations" with

reference to passenger road service, freight service, and yard service. (J.A. 56-58)

In its preliminary statement to its answer to BRT Question 36, upon the basis of which it answered and ruled upon BRT Question 47, Arbitration Board 282 reaffirmed the reasons, stated earlier by the neutral members and heretofore noted, for the delegation of the arbitration of the crew-consist issue to Special Boards as follows:

> "As we have repeatedly stated, our purpose in providing for Special Board of Adjustment was to bring about prompt and final settlement of disputes over crew consist. We recognize that these disputes were complex and varied, and that they could be equitably resolved only after a careful and detailed examination of local conditions and the application of the guidelines laid down in the Award. * * *" (J.A. 69)

The "guidelines" which were established by the Award of Arbitration Board 282 are the "substantive requirements" with which the award of a Special Board of Adjustment must comply within the meaning of § 9, Third (a) of the Railway Labor Act, U.S.C.A., Title 45, § 159, Third (a). This was stated to be so in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 237 F. Supp. 404, 417, where the Court said:

> "* * * The substantive and procedural criteria specified in Award 282 govern the disposition of all crew consist issues within the scope of the Resolution. These apply to all proposed changes in 'rules' which, 'whether established by agreement, interpretation, or practice', undertake to require a stipulated number of trainmen. * * *"

It is obvious that evidence was necessary for a Special Board of Adjustment to determine whether, under the guidelines established by Arbitration Board 282, a change in the consist of a crew was warranted. It is also obvious that a record of the evidence which was before the Special

Board of Adjustment was essential in order for it to be determined, upon a review of the award of the Special Board of Adjustment, whether the award was in conformity with the substantive requirements as required by § 4 of P.L. 88-108 and § 9, Third (a) of the Railway Labor Act.

In its ruling in its Answer to BRT Question 36, and thus BRT Question 47, Arbitration Board 282 in its preliminary statement (J.A. 70) also recognized that:

> "Meaningful review involves neither more nor less than a determination whether a challenged decision by a Special Board has * * * applied the guidelines set forth in Section III, Parts A, B and C of the Award."

In its Answer to BRT Question 36, Board 282 held (J.A. 76):

> "The essential criterion is not whether there is substantial evidence to support the awards of the special boards of adjustment but rather whether there is substantial evidence to show that the special boards of adjustment failed to apply or to confine themselves to the guidelines prescribed by the Award of Board 282. On the basis of the record before it, the Board finds no evidence that the special boards failed to comply with the requirements of the Award."

Thus Board 282 found nothing in the record to show that the guidelines had not been followed. This was so only because there was no record at all. Similarly, the Board could have found nothing in the record to show that the guidelines were followed. We submit that where a meaningful review is a matter of right, the question before the reviewing body is not whether the record shows the original decision to be wrong, but whether there is enough in the record to show sufficient support for the original decision. This is impossible without a record which Appellant demanded.

What constitutes "meaningful review" was recently defined, at least in part, by the Supreme Court in *Kent* v.

United States, decided March 21, 1966, —— U.S. ——, 86 S. Ct. 1045. In that case, the Court said:

> "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating * * * including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made."

Compliance with § 4 of P.L. 88-108 and §§ 7 and 8 of the Railway Labor Act, to the extent that they require an Arbitration Board to make and certify a transcript of its proceedings and of the evidence taken by it, is necessary for there to be a meaningful review of the Award of a Special Board of Adjustment.

After the majority of the Special Board, consisting of the neutral and carrier members, overruled Appellant's objection to the Board proceeding other than in accordance with Sections 7 and 8 of the Railway Labor Act, the employee member of the board, General Chairman Roberts, requested the carrier to furnish him, as the employee member, with a full statement of the facts and all supporting data bearing upon the dispute to be heard by the board and that he be given an opportunity to prepare an answer to such statement and supporting data, as is the practice before the National Railroad Adjustment Board as provided by Section 3 of the Railway Labor Act. (J.A. 27-30, 42) The railroad claims to have furnished him with its written "submission" (J.A. 42-43) which consisted of about one hundred pages (J.A. 49). The procedure established for the First Division of the National Railroad Adjustment Board contemplates the service of "submissions" by each party on the other and for them to be filed and thus to constitute the "record" in the Adjustment Board. A "submission" is required to contain all relevant, argumentative facts, including all documentary evidence submitted in exhibit form and all data submitted in support

of the carrier's and employees' positions. Apparently that is what the carrier had prepared. (*National Railroad Adjustment Board Rules of Procedure*, Circular A of the First Division of the National Railroad Adjustment Board, October 22, 1937 and Circular B of the First Division of the National Railroad Adjustment Board, October 14, 1949; 29 Code of Federal Regulations, Chapter 3, Part 301.5 and Bureau of National Affairs, Labor Relations Reporter, LRX 6051-6054, included in appendix.)

Obviously the Special Board could have prepared and certified some sort of record but it is not claimed that it did and none has been made available to either Arbitration Board 282 or to any court.

In such circumstances not only is "meaningful review" impossible, but there is not the slightest semblance of compliance with §§ 7 and 8 of the Railway Labor Act and therefore with Section 4 of P.L. 88-108, and review under § 9 of the Railway Labor Act is likewise impossible.

Section 9, Third (a) of the Railway Labor Act provides that it is a ground for impeachment of the Award of an Arbitration Board that: "• • • the proceedings were not substantially in conformity with this chapter; • • •" and § 9, Fourth, provides that if an award is invalid on some ground designated in this section as a ground of invalidity, "the court *shall* set aside the entire award".

Thus, the ruling by Arbitration Board 282 on January 16, 1966 and its answer to BRT Question 47 remits the parties to "assumptions" and requires it to be "assume(d)" that the evidence before the Special Boards of Adjustment in question warranted the awards made by them under the guidelines prescribed by Arbitration Board 282, all of which is contrary to the concept of "meaningful review" as expressed by the Supreme Court in the *Kent* case, *supra*.

Thus also, the ruling by Arbitration Board 282 *makes it possible* for the delegation of the crew-consist issue to

Special Boards to mean that such boards, and in particular their single neutral member, may settle a dispute by compulsory arbitration without being subject to any meaningful review contrary to the explicit opinion of this Court in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 345 F. 2d 985, 987, where this Court said:

> "* * * the Board's delegation of the crew consist issue to special boards should not mean that such boards, and in particular their single neutral members, could settle a dispute by compulsory arbitration without being subject to any meaningful review. * * *"

In ruling upon BRT Question 36, Arbitration Board 282 said (J.A. 70):

> "* * * we deem it incumbent upon any party seeking a meaningful review of a decision of a Special Board to make such review possible * * * by providing us with an adequate record. * * * [A] party wishing review of a decision by a Special Board must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceeding before that Board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary, the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost. * * *"

This was the position taken by the Special Board and reaffirmed by Arbitration Board 282 in this case. (J.A. 42, 78)

Presumably, Board 282 holds that the losing party, before he knows he is the losing party, must determine in advance whether he is going to need a record, and that the neutral must determine, before he has heard any evidence, whether a transcript will be necessary, for either or both of the parties who may be aggrieved by the Award of the Board to obtain a review of the Award. That holding is

contrary to P.L. 88-108 and sections 7 and 8 of the Railway Labor Act incorporated therein.

In Section 4 of P.L. 88-108 Congress used the commanding and mandatory word "shall" in providing that: "* * * the arbitration *shall* be conducted pursuant to §§ 7 and 8 of the Railway Labor Act, the Board's award shall be made and filed as provided in said sections and *shall* be subject to Section 9 of said Act. * * *" (Emphasis added.)

Section 7, Third (f) of the Railway Labor Act, also uses the mandatory and commanding word "*shall*" in providing that: "The board of arbitration *shall* furnish a certified copy of its award to the respective parties to the controversy, and *shall* transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the Clerk of the District Court of the United States * * * to be filed in said Clerk's office as hereinafter provided. The said Board *shall* also furnish a copy of its award and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; * * *" (Emphasis added.)

Section 7, Third (g) provides that: "A Board of Arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings."

Congress, in recognition of the obligation of an Arbitration Board to make a transcript of the evidence taken at its hearings, provided authority for it to obtain the services necessary to do so.

In Section 2 of Public Law 88-108 the National Mediation Board was "authorized and directed * * * to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution * * *."

The Award of Board 282 provided that the costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties *unless different arrangements can be made by mutual agreement.* The employee member of the Special Board requested the carrier member of the Board to join in a request to the National Mediation Board for it to pay the costs and expenses of the neutral member and any incidental expenses in connection with the Special Board. (J.A. 24). Both the neutral member of the Special Board and the National Mediation Board were advised of the request. (J.A. 24-25) The carrier member of the Special Board refused to join in the suggested request on the ground that the National Mediation Board had advised that the award of Board 282 required the parties to pay the costs and expenses of the neutral member and the incidental expenses of the Special Board and both the neutral member of the Special Board and the National Mediation Board were advised of its refusal. (J.A. 26-27) But, the National Mediation Board had advised *only* that the costs and expenses of *the neutral member* should be shared equally by the parties and called attention to the provisions of the Award of Board 282 that such expenses should be borne equally by the parties "unless different arrangements can be made by mutual argeement". (J.A. 20-27)

The National Mediation Board and the neutral member of the Special Board ignored the situation although, as heretofore shown, Section 2 of Public Law 88-108 authorized and directed the National Mediation Board to provide "such services • • • as may be necessary and appropriate in carrying out the purposes of this joint resolution • • •" and Section 7, Third (g) of the Railway Labor Act authorized a Board of Arbitration to employ and fix the compensation of such assistants as it deems necessary in carrying on an arbitration and Section 7, Third (f) of the Railway Labor Act required the preparation of a transcript and Section 4 of Public Law 88-108 required the

arbitration to be conducted pursuant to Sections 7 and 8 of the Railway Labor Act. The proposed request of the employee member of the Special Board was proper. The Special Board should have joined in it and the National Mediation Board should have done as Congress directed and should have provided the services necessary for the Special Board to have made a transcript of its proceedings of the evidence taken by it as required by P.L. 88-108 and § 7 of the Railway Labor Act.

There is no room under the provisions of Section 4 of P.L. 88-108, nor under the provisions of § 7 Third (f) of the Railway Labor Act, nor under the provisions of Section III B (3) of the Award of Arbitration Board 282, for concluding that the making of a transcript by an arbitration board is or could be dependent upon the willingness of one party or the other to pay or share the costs of making it, nor upon the discretion of the neutral arbitrator as to whether a transcript was necessary.

Congress does not place upon either party to an arbitration, even in cases where the arbitration is voluntary, and certainly it did not in this situation where Congress made the arbitration compulsory, and neither did Arbitration Board 282 undertake to place upon a party to the arbitration required by Congress, a duty to provide its own transcript of the evidence in order to obtain a review of the award of the Arbitration Board in the event such party became an aggrieved party to the award.

Thus, the Special Board of Adjustment was commanded and enabled by Congress and by Board 282, *sua sponte*, to make and certify a transcript of its proceedings and the evidence. If it had done so, as Appellant undertook to have it do, a meaningful review of the awards of the special boards of adjustment in question could have been made by Arbitration Board 282 and by the courts under § 9 of the Railway Labor Act.

IV

The Ruling By Arbitration Board 282 on January 16, 1966 That a Special Board of Adjustment Was Not Required to Make and Certify a Transcript of Its Proceedings and of the Evidence Taken By It Would Deny to a Party Aggrieved By the Award of Such Board a Meaningful Review of the Award By Arbitration Board 282 and By the Courts and Would Deprive Such Party of Its Property Without Due Process of Law Contrary to Amendment V of the Constitution of the United States

The right to bargain collectively is a fundamental human right existing at common law. *American Steel Foundries* v. *Tri City Central Trades Council*, 257 U.S. 184, 209 (1921); *Texas & N. O. R. Co.* v. *Ruy. Clerks*, 281 U.S. 548, 570 (1930); *N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1, 33 (1937); *Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261, 263 (1940); *Williams* v. *Yellow Cab Company*, 200 F. 2d 302 (3d Cir. 1952), cert. den. 346 U.S. 840 (1953). Compulsory arbitration was required by P.L. 88-108 both as to the "fireman issue" and "crew-consist issue". Arbitration Board 282, in fact, completed the arbitration of the fireman issue so that no further arbitration of it was required but it did not, in fact, do so with the crew-consist issue. It delegated to Special Boards of Adjustment the arbitration of most of the crew-consist issue. To the extent that the "fireman issue" and the "crew-consist issue" were *in fact* arbitrated by Board 282, review of the award was possible because Arbitration Board 282, in conducting that arbitration, complied with Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act by making and certifying a transcript of its proceedings and of the evidence taken by it and by filing such transcript together with its award with the Clerk of the United States District Court for the District of Columbia. The award was in fact reviewed under Section 9 of the Railway Labor Act, U.S.C.A., Title 45, Sec. 159. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11 (D.C. D.C. 1964),

affirmed 331 F. 2d 1020 (D.C. Cir., 1964). Compulsory arbitration by Special Boards of Adjustment was substituted for the right to bargain collectively with respect to substantially all of the crew-consist issue.

Arbitration Board 282 has now, by its rulings on October 10, 1965, undertaken to deny to the parties to the arbitration conducted by the Special Boards of Adjustment any review of the awards of such Special Boards of Adjustment and particularly to deny any "meaningful review" of those awards because such a review necessarily requires a consideration of the evidence taken by such board upon the basis of which it made its award under the "guidelines" established by the Award of Arbitration Board 282, as heretofore noted.

This Court, in *Washington Terminal Company* v. *Boswell*, 124 F. 2d 235, 247, recognized that the denial of judicial review to an employee adversely affected by an award of the National Railroad Adjustment Board (which, as heretofore noted, does proceed upon the basis of a "record" consisting of "submissions") raises questions as to the constitutional validity of such a denial.

The Court in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 237 F. Supp. 404, 418 (D.C. D.C., 1964), stated that:

> "* * * The actions of the Special Board * * * bear vividly the imprimatur of government, and must withstand the test of the Fifth Amendment. * * *"

This Court, in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 120 App. D.C. 297, 345 F. 2d 985, 987, stated:

> "* * * The Board's delegation of the crew consist issue to Special Boards should not mean that such boards, and in particular their single neutral members, could settle a dispute by compulsory arbitration without being subject to any meaningful review. * * *"

In footnote 4, this Court stated:

> "We upheld the Board's authority to delegate the crew consist issue to Special Boards in Brotherhood of Locomotive Firemen & Enginemen v. Chicago B. & Q. R. Co., D.C. 225 F. Supp. 11, affirmed 118 U.S. App. D.C. 100, 331 F. 2d 1020, Cert den. 377 U.S. 918, 84 S. Ct. 1181, 1182, 12 L. Ed. 2d 187 (1964). But cf. Schechter Poultry Corp. v United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), which holds that delegated authority must be defined by legislative standards; meaningful review procedures ensure that such authority is exercised within those standards."

The concept of meaningful review, as expressed by the Supreme Court in *Kent* v. *United States*, *supra*, is that:

> "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating * * * including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made."

The ruling by Arbitration Board 282 would and does deny to an aggrieved party to an award of a Special Board of Adjustment a transcript of the evidence heard by such Board and would and does thereby remit such party to "assumptions" and requires it to be "assume(d)" that the evidence heard by the Special Board warranted its award under the guidelines established by Arbitration Board 282, all of which would be and is contrary to a proper concept of meaningful review.

No question respecting such a denial of due process of law arises if Public Law 88-108 is construed to require Special Boards of Adjustment to conduct the arbitration delegated to them by Arbitration Board 282, pursuant to Sections 7 and 8 of the Railway Labor Act.

In *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), the Court said l. c. 749:

> "When validity of an Act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

The construction here urged is not only correct but would avoid the constitutional question of whether the awards of the Special Board, and the rulings of Board 282 approving the procedure followed in reaching the awards of the Special Boards, deprive Appellant of rights without due process of law.

V

The Award of the Special Board Discloses on Its Face That It Does Not Conform to the Substantive Requirements for the Arbitration Which Was Delegated to It Because It Was Based Partly Upon the Awards of Special Boards and Upon an Agreement Establishing Minimum Crew Consists on Other Railroads and the Ruling of Arbitration Board 282 Sustaining It Should Have Been Impeached

The railroad proposed to reduce the minimum number of employees required by the existing collective bargaining agreement to a minimum of (1) a foreman and one helper in one yard, (2) a foreman and two helpers in two yards, (3) a conductor and two brakemen in thirteen road crews. (J.A. 12).

As heretofore shown, the carriers, in their argument to Board 282, pointed out that operating conditions, operating methods, and service requirements vary greatly from railroad to railroad, from division to division, and from yard to yard on the same railroad, and, over significant periods of time, on the same division and in the same yard.

Arbitration Board 282 found that there were variations in the size of crews which depended on a great complex of

factors as reflected by the guidelines it established and that the consist of crews must be determined primarily by local conditions. It was for those reasons that Arbitration Board 282 delegated the arbitration of the crew-consist issue to Special Boards of Adjustment. The District Court for the District of Columbia and this Court recognized that the crew consist issue was to be determined locally and on the basis of individual crews.

The awards of fifteen other Special Boards were listed in the carriers' "submission" to the Special Board in question. (J.A. 43, 45). It is not clear from the affidavit of M. L. Erwin, the railroad's Personnel Manager and member of the Special Board, whether all or only one of those awards was copied in full as was the award affecting the Missouri Pacific (J.A. 43, 45). The affidavit of the railroad's member of the Special Board states that the awards of these other Boards were "utilized only as precedents, illustrating the manner in which the guidelines prescribed in the award by Arbitration Board 282 were applied with respect to similar disputes involving other carriers". (J.A. 43). The award affecting the Missouri Pacific, which was copied and submitted to the Special Board established for the Missouri Pacific what the St. Louis Southwestern was contending for before its Special Board, i.e. "all main line local freight trains will be operated with a minimum of two brakemen" and "there shall be a minimum of one helper on any yard engine engaged * * * yard service * * *." (J.A. 45-46).

The awards of the two Special Boards on the Missouri Pacific and on the Texas & Pacific are the subject of the appeal in the *Brotherhood of Railroad Trainmen, Appellant v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co., et al.*, Nos. 19,867, 20,003, 20,004 in this Court. They purport to establish on the Missouri Pacific and Texas & Pacific the same rule which was contended for by the St. Louis Southwestern. Similarly, the agreement as re-

ported in the "Trainman News" between the Chicago, Rock Island & Pacific R. Co. and the Brotherhood of Railroad Trainmen established a minimum crew of at least two trainmen on all main line freight trains which was contended for by the St. Louis Southwestern for its main line local trains. (J.A. 47) The railroad claims that the "Trainman News" article indicated the satisfaction of the Brotherhood of Railroad Trainmen with that disposition made of the crew consist issue as made on the Rock Island and that its only purpose in placing the article reporting the Rock Island agreement before the Special Board was for such precedential value as it might have in illustrating the "manner in which" a similar dispute had been disposed of with the concurrence of the Brotherhood and that it was not referred to in the written submission made by it to the Special Board of Adjustment. Obviously, the "Trainman News" article could not have been included in the carriers' written submission because that submission was made on June 15, 1964, and the "Trainman News" article was dated July 6, 1964, over eight days before the award of the Special Board was made at St. Louis, Missouri on July 14, 1964. (J.A. 31, 46, 49). The reported Rock Island agreement had its intended effect upon the neutral member. It resulted in the neutral member allowing reductions in crews which, theretofore, he had not contemplated allowing. (J.A. 51).

As heretofore shown in the Statement of the Case, there is a dispute as to whether Appellant objected to the awards of the Special Board on other railroads and the agreement on the Rock Island being considered for any purpose. (J.A. 43-44, 49-50-51, 52-53). A transcript of the proceedings, as required by Section 2 of Public Law 88-108 and Section 7 of the Railway Labor Act, would have eliminated the dispute and further points up the need for it.

Regardless of how that dispute is resolved, the Special Board had no authority to take those matters into consideration or to base its award upon them.

As heretofore shown, the guidelines, established by Arbitration Board 282 for the arbitration of the crew-consist issue by Special Boards, constitute the *substantive requirements* for the arbitration which is to be done by Special Boards of Adjustment. Not one of the "guidelines", which are reproduced in full in the Joint Appendix at pages 56-58, authorize a Special Board of Adjustment to consider awards of Special Boards or agreements establishing the consist of crews *on other railroads* with their own local and varying conditions. Notwithstanding the absence of any "guideline" authority for doing so, the award of the Special Board in question was made, in the language of the award itself, "on the basis of all the relevant evidence submitted by the parties, including awards of other Special Boards, created under the Award of Arbitration Board 282, and the agreement reached between the Brotherhood and the C. R. I. & P. R. Co. on June 17, 1964, (relating to the crew consist issue). * * * " (J.A. 31).

Section 4 of the Public Law 88-108 made *the arbitration* subject to Section 9 of the Railway Labor Act (U.S.C.A., Title 45, Sec. 159). Section 9, Third (a) provides that one of the grounds for impeachment of an arbitration award is that "the award plainly does not conform to the substantive requirements" which, as to Special Boards under the Award of Arbitration Board 282 are, as heretofore noted, the "guidelines" established by Board 282. Section 9, Fourth, of the Railway Labor Act requires a court to "set aside the entire award" if it "shall determine that * * * the award is invalid on some ground or grounds designated in this section as a ground of invalidity".

For all of the foregoing reasons it is respectfully submitted that the judgment of the District Court sustaining the ruling by Arbitration Board 282 in answer to BRT Question No. 47 and the validity of the award of the Special Board of Adjustment involved should be reversed and

the ruling and answer by Arbitration Board 282 together with the award of the Special Board of Adjustment should be impeached.

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APPENDIX

United States Code Annotated, Title 28—§ 1291

§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655 § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

Public Law 88-108—77 Stat. 132, U.S.C.A., Title 45, Section 157 (Supp. 1965)

Sec. 2. There is hereby established an arbitration board to consist of seven members.

* * *

Notwithstanding any other provision of law, the National Mediation Board is authorized and directed:

* * *

(2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

* * *

The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto.

* * *

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to

sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act.

* * *

Railway Labor Act, § 3

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(h) The said Adjustment Board shall be composed of four divisions.

* * *

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings of the employee or employees and the carrier or carriers involved in any disputes submitted to them.

• • •

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

• • •

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary.

• • •

Establishment of System, Group, or Regional Boards by Voluntary Agreement

Second: Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section.

• • •

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons:

* * *

(e) *Duty to reconvene; questions considered*

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(f) *Award; disposition of original and copies*

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court

of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however*, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(*g*) *Compensation of assistants to board of arbitration; expenses; quarters*

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceeds. The compensation of such employees, together with their necessary traveling expenses and expnses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or delibrations.

(*h*) *Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees*

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the

production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

• • •

Section 8 Railway Labor Act—U.S.C.A., Title 45, Section 158

• • •

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

• • •

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowl-

edged in the same manner, and filed in the same district court clerk's office, as the oriignal award, shall be a part of and shall have the same force and effect as such original award; and

• • •

Section 9 Railway Labor Act—U.S.C.A., Title 45, Section 159

First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption

which fraud or corruption affected the result of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Effect of partial invalidity of award

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however*, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

• • •

National Railroad Adjustment Board Rules of Procedure

Rules of Organization and Procedure Issued by the National Railroad Adjustment Board as Circular No. 1, October 10, 1934, and Codified in Code of Federal Regulations as Title 29, Chapter III, Part 301.

PART 301—RULES OF PROCEDURE

• • •

Sec. 301.5 Form of Submission.

(*a*) *Parties.* All parties to the dispute must be stated in each submission.

(*b*) *Statement of claim.* Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(*c*) *Statement of facts.* In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts," then each party shall show separately the facts as they respectively believe them to be.

(*d*) *Position of employees.* Under the caption "position of employees" the employee must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(*e*) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(*f*) *Signatures.* All submissions must be signed by the parties submitting the same.

(*g*) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

Joint Submissions to First Division

Circular A. Issued by the Executive Secretary of the National Railroad Adjustment Board's First Division, October 22, 1937, Pursuant to the Board's Rules and Regulations (Circular No. 1, SLL 6051).

To the Representatives of the Carriers and the Employees Subject to the Jurisdiction of the First Division:

Your attention is directed to the following rules contained in Circular No. 1, issued by the National Railroad Adjustment Board on October 10, 1934, governing the preparation of submissions, reading as follows:

"*Position of Employees:* Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement on rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."

"*Position of Carrier:* Under this caption the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute."

which clearly show that:

(1) The representatives of the parties must in their respective positions, clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and

(2) All data submitted in support of their respective positions must affirmatively show the same to have been

presented to the other party and made a part of the particular question in dispute.

The rules above cited are not being observed by all parties in the preparation of submisisons. Data, exhibits and argumentative facts are being withheld and presented at the hearing in the form of a written argumentative statement amounting to an evasion of said rules, which rules were designed to require a compliance with the law, conserve time, expedite the proceedings and thus obviate the need of lengthy briefs and unnecessary oral discussion.

The Railway Labor Act places upon the members of the Division the responsibility for making an award upon disputes *when properly submitted* to the Division, and it is necessary that the representatives of the carriers and employees, parties to the disputes, first discharge their responsibility for preparation of submission in accordance with rules adopted by the Division. The Division will continue to enforce a compliance with its rules governing the preparation of submissions, and will not, unless jointly requested by the parties, accept any written matter offered subsequent to the filing of the original submission or at the hearing which, under the rules, should have been made a part of the record in the original submission. Any other prepared memoranda intended for submission at an oral hearing must be restricted to an explanation of matter contained in the record, and copies thereof must be exchanged between the parties prior to the date of hearing.

Ex Parte Submissions to First Division

Circular B, Issued by the Executive Secretary of the National Railroad Adjustment Board's First Division, October 14, 1949.

To the Representatives of the Carriers and the Employees Subject to the Jurisdiction of the First Division.

The following changes in the rules of procedure with respect to ex parte submissions are adopted effective November 1, 1949:

The party or parties making an ex parte submission shall, at the time of filing the submission with the Division, furnish a copy of such submission to the other party or parties to the dispute. The other party or parties to such dispute shall have thirty (30) days from the date of notification by the first Division that the submission has been received in which to answer such submission and shall, at the time of filing such answer, furnish copy of the answer to the submitting party or parties.

The submitting party or parties shall then have thirty (30) days from the date of notification by the Division that such answer has been received in which to file a reply to such answer if desired and, at the time of filing such reply, shall furnish copy thereof to the opposing party or parties.

Such reply shall be limited to response to the answer and shall contain no new facts or matter not in direct response to the points contained in such answer.

Nothing herein shall change existing rules or practices with respect to extentions of time and they shall be applicable to submissions, answers or replies.

Notice to the Secretary, First Division, of intention to file ex parte submissions, is not required from and after November 1, 1949.

Former rules shall apply with respect to any notice of intention to file an ex parte submission, received by the Secretary of the division before November 1, 1949.

By direction of the First Division, National Railroad Adjustment Board.

APPELLANT'S REPLY BRIEF

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,212

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Appellee*.

No. 20,213

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, ET AL., *Appellees*.

On Appeal from Orders of the United States District Court for the District of Columbia

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APPELLANT'S REPLY BRIEF

ARGUMENT

I

Public Law 88-108 Precludes Sustaining the Ruling by Arbitration Board 282 That the Special Board of Adjustment for Which It Provided Was Not Required to Comply With the Procedures Required by Sections 7, 8 and 9 of the Railway Labor Act as a "Permissible Interpretation" of Its Award

The question presented by this case is much more fundamental than merely whether the ruling by Arbitration Board 282 in answer to BRT Question 47 was a permissible interpretation of its Award.

The question presented by this case is whether Public Law 88-108 requires all or only a part of the arbitration of the crew consist issue to be conducted pursuant to Sections 7 and 8 of the Railway Labor Act and whether Public Law 88-108 made all or only a part of the arbitration of the crew consist issue subject to Section 9 of the Railway Labor Act.

This case involves the legality of the actual arbitration of a substantial part of the crew consist issue which was required by Public Law 88-108.

The dispute which Congress, by enacting Public Law 88-108, required to be arbitrated was, insofar as this case is concerned: whether all rules, requiring a carrier to man its train and yard crews with a stipulated number of helpers, should be abolished or whether a national rule requiring carriers to man those crews with a minimum of two helpers should be made.

Arbitration Board 282 found that it could not arbitrate the entire crew consist issue because of the great variance in the size of crews and its inability to determine from the evidence the extent to which overmanning or undermanning existed. It concluded that the consist of crews

must be determined primarily by varying local conditions (41 Labor Arbitration Reports, 682, 693-695).

The only part of the crew consist issue which Arbitration Board 282 did *in fact* arbitrate was with respect to crews in main line freight service. As to those crews, it prohibited a change in rules which required a conductor and *two* trainmen or helpers and delegated the arbitration of the dispute as to all other crews to Special Boards of Adjustment. (J.A. 14-15 and *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy Railroad Company,* 225 F. Supp. 11, 17, 20 (D.C. D.C., 1964).

In the impeachment proceeding with respect to the Award of Arbitration Board 282 it was understood by the District Court and by this Court that the arbitration of crew consist issues was extensive and that neither could nor would it be complete in fact unless and until a Special Board made an award upon a proposal to change a rule requiring either more or less than a conductor and two helpers to be in a crew not working in main line freight service. In that case, *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.,* the the District Court said (225 F. Supp. 11, 20):

> ". . . Counsel for the plaintiff further urge that the board failed to comply with the requirement of Section 3 [of Public Law 88-108], that the award should constitute a complete and final disposition of the issues covered by its decision. They point to the fact that the board provided that numerous individual disputes concerning the sizes of train crews should be referred from time to time to local boards and they argue that such a provision constituted a failure on the part of the board to make a complete and final disposition of the issues. This contention is entirely lacking in merit. What the board did was to bar any changes for the time being and to prescribe a definite formula and a group of concrete principles to govern the determination of numerous disputes that were

> bound to arise in the future as to the composition of train crews on individual trains. Conceivably, there could be thousands of such disputes from time to time. It then constructed machinery for the disposition of these matters. These provisions must be deemed in essence to constitute a complete and final disposition of the issues. The situation is analogous to that of an interlocutory judgment determining issues framed by the pleadings or by a pretrial order followed by a reference to a special master to state an account or assess damages on the basis prescribed by the court."

Surely it requires no citation of authority for the proposition that a Special Master, to whom a reference is made, acts as the agent of and for and on behalf of the court making the reference and that a reference to a Special Master is not *in fact* a final disposition of the matter. The Special Master must proceed and his proceedings and report are subject to final approval or rejection by the court making the reference.

In Section 2 of Public Law 88-108 Congress required:

> "The Arbitration Board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as . . . 'consist of road and yard crews' and that portion of the organizations' notices of September 7, 1960 identified as 'minimum safe crew consist' and implementing proposals pertaining thereto."

Considering the extent of the issues made by the notices served by the carriers and by the organizations, it is apparent that "a decision" "as to what disposition shall be made of those" notices as required by P.L. 88-108 could not *in fact* be made unless and until a Special Board made an award upon a proposal to change a rule requiring either more or less than a conductor and two helpers in a crew not operating in main line freight service and that the

"decision" was required to be made "pursuant to the procedures hereinafter set forth".

In Section 4 of Public Law 88-108, Congress required that:

> "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to §§ 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to § 9 of said Act . . ."

There is no inconsistency between any provision of Public Law 88-108 and the requirements of §§ 7 and 8 of the Railway Labor Act for an Arbitration Board to take evidence under oath and to make and certify a transcript of its proceedings and of the evidence taken by it.

Appellees point out some inconsistencies between the requirements of §§ 7 and 8 of the Railway Labor Act and the Award of Arbitration Board 282. Such inconsistencies are not relevant to the questions here involved. (Appellees Brief, pp. 26-27). It is not even claimed by appellees that there is any inconsistency between any provision of Public Law 88-108 and the provisions of §§ 7 and 8 of the Railway Labor Act which require Arbitration Boards to take all testimony under oath and to make and certify a transcript of their proceedings and of the evidence taken by them. We are not here relying on any provisions of the Railway Labor Act inconsistent with any provision of Public Law 88-108.

The only inconsistency is between § 4 of Public Law 88-108 adopting those provisions of §§ 7 and 8 of the Railway Labor Act and the ruling by Arbitration Board 282 in answer to BRT Question number 47 based upon its prior answer to BRT Question number 36 to the effect that Special Boards of Adjustment, in performing their part of the arbitral process of resolving the crew consist issue,

are not required to take all testimony under oath or to make and certify a transcript of their proceedings and of the evidence taken by them.

Thus is presented the question whether effect shall be given to the provisions of Public Law 88-108 which required "the arbitration" of "the crew consist issue" "to be conducted pursuant to §§ 7 and 8 of the Railway Labor Act" or to the ruling by Arbitration Board 282 that Special Boards of Adjustment are not required to conduct the arbitration of that issue pursuant to those sections of the Railway Labor Act.

The requirement of § 2 of Public Law 88-108 (that the "decision" as to "what disposition shall be made" of the carriers' and organizations' notices shall be made "pursuant to the procedures hereinafter set forth") and the requirement of § 4 of Public Law 88-108 that "the arbitration shall be conducted pursuant to §§ 7 and 8 of the Railway Labor Act" were not dependent upon whether "the decision" was made or "the arbitration" was conducted by Arbitration Board 282 all by itself or partly by it and partly by a Special Board of Adjustment for which it provided. Both Arbitration Board 282 and its Special Board of Adjustment make the same decisions, conduct the same arbitration and both of them were bound by the same law in doing so.

The ruling by Arbitration Board 282 in answer to BRT Question number 47 and the award of the Special Board made in violation of that law cannot stand.

II

The Analogy Attempted by Appellees Between the Duty of a Court and Other Arbitration Boards With Respect to Making a Record of Their Proceedings and of the Evidence Is Not Apt Because There is a Statutory Requirement for the Arbitration Boards Involved in This Case to Make and Certify a Transcript of Their Proceedings and of the Evidence Taken by Them

Appellee argues that it was not the duty of a Special Board to make and certify a transcript of its proceedings and of the evidence taken by it because formerly in the Federal Courts it was not required that evidence be recorded except at a parties expense and now that it is required to be recorded it is not transcribed at the expense of a party and that no transcript is required in arbitration proceedings "absent a statutory requirement or agreement". Here, as distinguished from the situation in the cases cited by appellees, there is a statutory requirement for such a transcript as hereinafter is shown.

III

It Is Immaterial That the Brotherhood Did Not Incur the Expense of Making a Transcript of the Proceedings and the Evidence Taken by the Special Board of Adjustment

The carrier argues (Br. 24-26) and its argument is echoed by the Government (Br. 6-7, 10, 12) that the Brotherhood, at its own expense, should have provided a transcript of the proceedings and evidence taken by the Special Board if it desired a review of the proceedings and that its refusal to incur the expense should preclude the complaint it makes based upon the failure of the special board itself to make such a transcript.

The Brotherhood's complaint is based upon the provisions of § 4 of P.L. 88-108, § 9 Third (a), § 9 Fourth and § 7 First (f) of the Railway Labor Act, none of which contains any provision regarding the payment of any expense.

Section 4 of P.L. 88-108 provides that: "The arbitration shall be conducted pursuant to §§ 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to § 9 of said Act."

Section 9 Fourth of the Railway Labor Act requires that: "The court shall set aside the entire award" of an arbitration board "If the court shall determine it is invalid on some ground or grounds designated in this section as a ground of invalidity" even if the court "shall determine that part of the award is valid".

One of the grounds of invalidity contained in § 9 Third (a) of the Railway Labor Act is "that the proceedings [of the board] were not substantially in conformity with this chapter."

Section 7 First (f) of the Railway Labor Act provides that: "The board of arbitration . . . shall transmit the original [of its award], together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court. . . ."

Admittedly, the foregoing ground of invalidity requiring the entire award to be set aside does exist and does not depend upon who should pay for the transcript.

However, with regard to the payment of the expense incident to the preparation of the transcript, provision was made for the board itself to defray that expense. One means was noted in the Brotherhood's Brief on pages 30-32.

In addition thereto the Award of Arbitration Board 282 itself, in part B(3) (J.A. 56) provided that: "The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement." Hence, the Special Board of Adjustment itself

was empowered to provide a transcript and to require the expense necessary to do so to "be shared equally by the parties", just as it was authorized to and did impose upon the parties "the costs and expenses of the neutral member".

The failure of the special board to discharge its legal obligation under § 4 of P.L. 88-108 cannot be visited upon the losing party to the arbitration.

IV

There Is No Basis for the Application of the Doctrine of Res Judicata in This Case

On February 20, 1964 this Court determined the validity of the Award of Arbitration Board 282 in *Brotherhood of Locomotive Firemen & Enginemen* v. *CB&Q R. Co.*, 118 U.S. App. D. C. 100, 331 F2d 1020, affirming 225 F. Supp. 11.

The Special Board in question did not meet until June 15, 1964 and its award was not made until July 14, 1964 (J.A. 30-31).

It is apparent that the issue as to the procedure to be followed by the Special Board involved in this case did not exist and could not have existed at the time the validity of the Award of Board 282 was in question and could not have been adjudicated in the impeachment proceeding involving the Award of Board 282 which was finally determined in February 1964.

In *Lawler* v. *National Screen Service Corp.*, 349 U.S. 222 (1955), the plaintiff claimed that the defendant and others had violated Federal anti-trust laws. Defendant, National Screen, interposed the defense of res judicata on the ground that the plaintiff had sued it seven years earlier on the same matter. The District Court and the Court of Appeals found that the two suits were based on essentially the same wrongful conduct and applied the doctrine of res

judicata. The Supreme Court reversed, holding that res judicata did not apply, because the conduct complained of was all subsequent to the earlier judgment and said (349 U.S. l.c. 328):

> "... While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. ..."

Respectfully submitted,

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BRIEF FOR THE APPELLEE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,212

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Appellee*.

No. 20,213

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, ET AL., *Appellees*.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of this Appellee, the questions presented are as follows:

1. Whether the ruling by Arbitration Board No. 282 in answer to BRT Question No. 47 that its Award does not subject special boards of adjustment created pursuant thereto to the requirements of Sections 7 and 8 of the Railway Labor Act constitutes a permissible interpretation of that Award?

2. Whether the ruling by Arbitration Board No. 282 in answer to BRT Question No. 47 that an award by a special board of adjustment pursuant to Award 282 was not invalidated under the circumstances involved by the fact that the special board of adjustment considered certain awards made by other special boards of adjustment and certain crew-consist agreements constitutes a permissible interpretation of Award 282?

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IN THE

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ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

These are consolidated appeals by the Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT" or the "Brotherhood") from orders denying its petitions, filed under Section 9 of the Railway Labor Act (45 U.S.C. §159), to impeach the answer by Arbitration Board No.

282 to BRT Question No. 47. Two separate but substantially identical petitions were filed by the BRT in the District Court. The St. Louis Southwestern Railway Company* (hereinafter referred to as the "carrier") was named as a respondent to both petitions, and Ralph T. Seward (the Chairman of Arbitration Board No. 282) was named as a respondent to one of the petitions.

Statement of the Case

Section III of the Award by Arbitration Board No. 282, under Public Law 88-108 (77 Stat. 132), established a procedure for changing rules requiring the use of a specified number of trainmen in road and yard service (J.A. 53-59). After written notice of proposed changes in such rules is given by the carrier or by the union representing the interested employees, the parties are required to meet and confer about the proposed changes. If no agreement is reached, either party may submit the dispute to a special board of adjustment—composed of one carrier representative, one union representative and a neutral member selected by the National Mediation Board if not agreed upon by the union and carrier members—for determination pursuant to guidelines specified in the Award.

On February 25, 1964, the carrier served the BRT with a written notice under Section III of the Award (J.A. 12-13), and shortly thereafter the BRT served a counter-notice upon the carrier (J.A. 13-15). After negotiations between the parties failed to result in an agreement, the carrier referred the dispute to a special board of adjustment (J.A. 8, 16-17). The special board rejected a contention by the BRT that Sections 7 and 8 of the Railway Labor Act (45

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*Erroneously referred to in the caption and body of Appellant's Brief as the St. Louis Southwestern Railroad Company. See J.A. 2, 32.

U.S.C. §§157, 158) applied to special boards of adjustment created under the Award, so as to require the special board to make a transcript of its proceedings and take evidence under oath, among other things (J.A. 27-28, 42). However, each party was informed that it could have a court reporter present to make a transcript of the proceedings if it desired to do so, and the witnesses testified under oath (J.A. 42-43). Neither party arranged for a transcript to be made (J.A. 42). Written submissions by the parties were exchanged, however, as requested by the BRT (J.A. 29-30, 42-43).

In addition to receiving written submissions, exhibits and oral testimony, the special board made on-the-ground observations of a significant part of the affected territory, including observations of actual operations (J.A. 44). Its award was made in accordance with the guidelines specified by Award 282 as applied to all the revelant evidence (J.A. 30-31, 44). Among the exhibits were a number of awards by other special boards of adjustment which were marked as "Joint Exhibit No. 7." In affidavits filed with the court below, the carrier member of the special board asserts (J.A. 43) that Joint Exhibit No. 7 was submitted by both parties, as is indicated by its designation, while the union member of the special board asserts that the exhibit was submitted by the carrier and was so marked by the neutral member because it "was not truly partisan and not prepared for the Board as such" (J.A. 49). The carrier member asserts (J.A. 43, 52) that the BRT did not object to the exhibits in any manner, and the BRT member asserts (J.A. 50) that he objected to use of the exhibit as "evidence." The assertion by the carrier member that the special board awards contained in the exhibit were utilized by the special board only as precedents illustrating the manner in which the guidelines had been applied to similar disputes involving other carriers (J.A. 43; see J.A. 45-46), and that

the BRT member also used the awards for that purpose (J.A. 52), is not disputed by the BRT member.

In addition, the carrier placed before the Board two agreements entered into by the BRT on June 17, 1964 with the Chicago, Rock Island and Pacific Railroad Company, and a statement by the BRT expressing its satisfaction with the results reached in those agreements (J.A. 43-44, 46-47). The carrier member asserts (J.A. 43-44, 52) that the BRT did not object in any manner to those exhibits, and the BRT member asserts (J.A. 51) the contrary. The statement by the carrier member (J.A. 44) that the only purpose of the exhibits "was for such precedential value as they might have in illustrating the manner in which a similar dispute had been disposed of with the concurrence of the BRT" is not disputed.

The special board of adjustment issued its award on July 14, 1964 (J.A. 30-31). Some time thereafter the BRT submitted BRT Question No. 47 to Arbitration Board No. 282. As restated by the Board, that question reads as follows (J.A. 3-4, 33):

> "Is the award of the Special Board of Adjustment (St. Louis Southwestern Railway Co.) valid, considering each of the following and if not, by reason of which of the following:
>
> "(a) The refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to provide and pay the expense necessary for the making of a transcript of the proceedings and of the evidence offered to and received by such Special Board of Adjustment and the refusal of such board to grant the request or demand of the Brotherhood of Railroad Trainmen for it to proceed only in accordance with §7 of the Railway Labor Act to the extent of taking testi-

mony under oath and making and certifying a transcript of its proceedings and of the evidence and papers presented to it, and [1]

"(b) Basing its award partly upon the 'award of other special boards created under the award of Arbitration Board 282,' and

"(c) Basing its award partly upon 'the agreement reached between the Brotherhood and the C.R.I. & P. Railroad on June 17, 1964 (relating to the crew consist issue).' "

The Board answered (J.A. 4, 33), on January 16, 1966, that:

"There is no basis for concluding that the Award of the Special Board of Adjustment is invalid for the reasons referred to in the question. See the Board's Preliminary Statement and its answers to B.R.T. Questions 32, 33 and 36."

In its answer to BRT Question No. 36(B)(1) Board 282 had previously ruled (J.A. 75) that:

"The special boards of adjustment provided for in Section III, Part B, of Award 282 are not required by the terms of the Award to adhere to procedures pre-

[1] The purported "refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to pay the expense necessary for the making of a transcript of the proceedings and of the evidence" actually consisted of a request that the carrier join with the BRT in asking the National Mediation Board "to pay the costs and expenses of the neutral member and any incidental expenses" in connection with the special board proceeding (J.A. 24-25, 41-42). Section III-B(3) of the Award (J.A. 56) provides that the "costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement," and, as the carrier pointed out in refusing the BRT request (J.A. 26-27, 42), the Mediation Board had already advised the parties that it would not pay such expenses in view of that provision.

> scribed in either Section 7 or Section 8 of the Railway Labor Act."

That ruling was accompanied by a Preliminary Statement (J.A. 60-71), in which the Board stated, among other things, "that it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act" (J.A. 68), and explained in detail why that was so (J.A. 66-68). The Board also stated that "we deem it incumbent upon any party seeking a meaningful review of the decision of a special board to make such review possible by filing a timely objection to the proceedings and by providing us with an adequate record" (J.A. 70), and that (J.A. 71):

> "By the same token, a party wishing review of a decision by a special board of adjustment must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary, the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost."

A petition by the BRT to impeach the answer to BRT Question No. 36(B)(1), among others, was denied by the District Court and an appeal by the BRT is now pending before this Court in Dockets Nos. 20,003 and 20,004. In his opinion accompanying his denial of that impeachment petition, Judge Holtzoff concluded "that the decisions of Board No. 282 involved in this proceeding, were entirely valid and proper and should be sustained." *In Re Certain Carriers, Etc.*, 248 F. Supp. 1008, 1013 (D. D.C., 1966). Judge Holtzoff further stated, in that opinion (*ibid.*), that:

> "The principal attack on the decisions of the special boards of adjustment, is that the proceedings conducted by these tribunals were informal and that no stenographic record was made of the testimony. The United States was, without objection, permitted to intervene in the present action. Counsel for the Government at the oral argument informed the Court that practically all of these special boards proceeded in the same manner and that no stenographic records were kept by most if not any of them. He called attention to the fact that at this late date if this mode of procedure were held to be in violation of law, it would be necessary to set aside and vacate all of the rulings of the special boards and to require them to conduct new hearings. The result would be delay and expense with possible detriment to both sides of the controversy."

In this regard, we note that the District Court has subsequently held that the procedures provided in the Award for changing crew-consist rules could not be invoked after January 25, 1966, and that proceedings under those procedures instituted before that date could not be completed after that date. *Akron & Barberton Belt R. Co.* v. *Brotherhood of Railroad Trainmen*, 252 F. Supp. 207, 210-211 (D. D.C., 1964), appeals pending, Nos. 20,152 and 20,172. If that ruling should be upheld, as the BRT is contending should be done, the crew-consist provisions of the Award could virtually be nullified altogether in the event of a holding by this Court on this appeal that the special boards of adjustment were subject to Sections 7 and 8 of the Railway Labor Act.

The petitions by the BRT to impeach the answer by Board 282 to BRT Question No. 47 also were denied by Judge Holtzoff, in an order entered on April 22, 1966 (J.A.

92). In his opinion (J.A. 89-91),[2] Judge Holtzoff relied upon his prior decision concerning the petition to impeach the answer to BRT Question No. 36(B)(1) with respect to the contention by the BRT that Sections 7 and 8 of the Railway Labor Act apply to proceedings of the special boards of adjustment. With respect to contentions by the BRT based upon the consideration by the special board of other special board awards and crew-consist agreements, Judge Holtzoff stated (J.A. 91) that:

> "Board 282 held that there was no basis for concluding that the award of the Special Board of Adjustment was invalid. This Court finds no basis for concluding that there is any error in this ruling of the type that would subject it to being impeached.
>
> "Actually, it must be borne in mind that the common law rules of evidence are not binding and do not apply to proceedings before Arbitration Boards. They do not even entirely apply to the proceedings before administrative agencies, and certainly not to arbitration proceedings. There is nothing unreasonable or basically wrong in considering what has been done in other similar cases.
>
> "It is argued by counsel, however, that the guidelines that are binding on the Special Boards and that are enumerated in the principal Award of Board 282, do not include a consideration of awards made in other similar proceedings. The guidelines, however, relate to matters of substance, not to matters of evidence. Consequently, this argument is untenable.
>
> "So, too, it is argued that it is the duty of the Special Board to confine itself to the situation presented in the particular case before it. There is no question but

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[2] Reported as *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern Ry. Co.*, 252 F. Supp. 961 (D. D.C., 1966).

that this is correct. In reaching a conclusion, however, there is nothing to prevent it from weighing what has been done in other similar cases. Whether we consider the reference to awards of other Special Boards as an application of the rule of *stare decisis* or as an admission of such awards as evidence, there is nothing inconsistent in such a course with a compliance with the guidelines and other provisions of Award 282."

Statutes Involved

We set forth in the Appendix hereto certain statutory provisions in addition to those set forth in the Appendix to Appellant's Brief.

Summary of Argument

The BRT seeks to impeach a ruling by Arbitration Board No. 282 in answer to BRT Question No. 47. Under the standards of review applicable in such impeachment proceedings, the ruling of the Board should be upheld if it constitutes a permissible interpretation of its Award as originally issued and as supplemented by prior unimpeached rulings which have become a part of its Award. Only if the Board's ruling is so inconsistent with any conceivable interpretation of its Award as to constitute an amendment to the Award or a new award may its ruling be impeached or set side. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir. 1950); *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W. D. Mo., 1949).

In answer to BRT Question No. 36(B)(1), Board 282 ruled that its Award did not subject the special boards of adjustment created thereunder to the requirements of Sections 7 and 8 of the Railway Labor Act. That ruling was followed by the Board in its answer to BRT Question No.

47. This Court had previously held that the issue should be submitted to Board 282 because it "is more familiar than we can be with respect to the Board's instructions" to the special boards of adjustment. Board 282 has now emphatically stated "that it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act" and has explained its reasons for that interpretation. This ruling is supported by the absence of any language in the Award which even arguably purports to subject the special boards to the requirements of Sections 7 and 8 and by the inconsistency of some of the specific provisions of the Award with certain requirements of Sections 7 and 8. It is also supported by the fact that, insofar as appears, none of the special boards have considered themselves to be bound to follow the requirements of Sections 7 and 8. The arguments of the BRT on this issue are unfounded and unpersuasive.

The special board of adjustment to which these appeals relate considered certain awards by other special boards of adjustment and certain crew-consist agreements, made pursuant to Award 282, for whatever weight they may have had as precedents illustrating what others had done in similar circumstances. As stated by the court below, there is "nothing unreasonable or basically wrong in considering what has been done in other similar cases." While the parties are in dispute as to whether the BRT raised any objection to the consideration of those special board awards and crew-consist agreements, it did not preserve and present to Board 282 any record of such objections. Under these circumstances, the ruling by Board 282 in answer to BRT Question No. 47 that the BRT had failed to establish any basis for a conclusion that the special board award was invalid does not constitute an impermissible interpretation of Award 282.

Argument

We demonstrate below that the District Court did not err in refusing to impeach the answer by Board 282 to BRT Question No. 47. Before doing so, however, we believe that it will be helpful to consider the standards governing review in an impeachment proceeding of interpretations by Board 282 of its Award—a matter that has been ignored by the BRT in its brief.

A. *The Standards To Be Applied in an Impeachment Proceeding Reviewing an Interpretation by Arbitration Board No. 282 of its Award.*

P. L. 88-108, which created Arbitration Board No. 282, provided, in Section 4, that "the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act" to the extent not inconsistent with P. L. 88-108, and "the board's award shall be made and filed as provided in said sections and shall be subject to Section 9 of said Act." Section 9 of the Railway Labor Act provides, in terms, a procedure for limited judicial review of "the award of a board of arbitration" constituted pursuant to Sections 7 and 8 of the Act, upon a petition to impeach the award filed within ten days after the award is filed with the appropriate district court. Petitions to impeach the Award by Board 282 were filed under Section 9 of the Railway Labor Act, as incorporated into Section 4 of P.L. 88-108, and the validity of the Award was upheld. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 118 U.S. App. D. C. 100, 331 F. 2d 1020 (1964).

Sections 7 Third (c) and 8(m) of the Railway Labor Act authorize a board of arbitration "to pass upon any controversy over the meaning or application of their award,"

and provide that the "rulings" by the board upon questions submitted by the parties in that regard shall be filed in the same court "as the original award and become a part thereof." In *Brotherhood of Railroad Trainmen* v. *Chicago M., St. P. & P. R. Co.*, 120 U.S. App. D. C. 295, 345 F. 2d 985 (1965), this Court held that awards by the special boards of adjustment were not reviewable by the courts, but rather were subject to review by Board 282 under the procedure established by Sections 7 Third (c) and 8(m) of the Railway Labor Act as incorporated into Section 4 of P.L. 88-108. The same conclusion was reached by this Court in *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 121 U. S. App. D. C. 230, 349 F. 2d 207 (1965), with special reference to the issue as to whether Sections 7 and 8 of the Railway Labor Act applied to the special boards of adjustment. After noting "that Board 282 is more familiar than we can be with respect to the Board's instructions when the Special Boards of Adjustment were convened," this Court noted that it did not have the views of Board 282 on the issue as to "whether or not the Special Boards of Adjustment had been required to conduct the arbitration in compliance with sections 7 and 8 of the Railway Labor Act," and concluded that that and another issue "properly come within the purview of the Board's primary jurisdiction." 349 F. 2d, at 210.[3]

The Railway Labor Act does not expressly provide, in Section 9 or otherwise, for judicial review of answers by boards of arbitration to questions submitted pursuant to Sections 7 Third (c) and 8(m). In *Order of Railroad*

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[3] This Court remanded the case with directions that an appropriate order be entered including permission to either party to submit the issues specified to Board 282. 349 F. 2d, at 210. BRT Question No. 36 subsequently was submitted with respect to the special board awards involved in that case, giving rise to the answer to BRT Question No. 36(B)(1) that is a subject of the impeachment proceeding now on appeal to this Court in Nos. 20,003 and 20,004. See p. 6, *supra*.

Telegraphers v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir., 1950), however, certain answers by an arbitration board were reviewed upon a petition to impeach filed under Section 9. In affirming a dismissal of the petition on the merits, the court rejected a contention that "the answers to all three questions submitted for interpretation went beyond the terms of the award in that they amended rather than interpreted the original award." *Id.*, at 117. The answer to Question 1 "merely reaffirm[ed] the position taken in the original award" as to a particular matter, the answer to Question 2 "did [not do] any more than supply a specific application of the award" to particular circumstances and thus "was a permissible interpretation of the original award," the answer to Question 3 simply "clarifie[d] what employees were included in the scope rule. . . ." *Id.*, at 117. An answer by an arbitration board also was reviewed in an impeachment proceeding under Section 9 in *Mid-Continent Airlines* v. *Brotherhood of Railway. Etc.*, 83 F. Supp. 976 (W. D. Mo., 1949). In that case, the answer was set aside as it "was entirely inconsistent with any conceivable interpretation or construction of [the] original award," so as in effect to constitute a "new award."[4] *Id.*, at 978.

The *New York Central* and *Mid-Continent Airlines* cases are the only reported decisions (except those now on appeal to this Court) involving petitions under Section 9 of the

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[4] The original award had provided for a wage increase of 17 cents per hour. The question submitted asked whether that amount was to be offset with respect to certain employees by a 12 cents per hour increase they had received in a contract negotiated by another union. The arbitration board answered that such employees were to receive an increase of 10 cents per hour. As the court pointed out, the only interpretations of the original award which were possible in the circumstances were that the employees were to receive the full 17 cents without offset or that the 17 cents was to include the 12 cents granted in the contract with the other union, leaving a net increase of 5 cents as a result of the award.

Railway Labor Act to impeach answers by a reconvened board of arbitration interpreting its award. Both of those cases accepted jurisdiction of the petitions and both applied the same standard in reviewing the answers. If the answer by a reconvened arbitration board constitutes a "permissible interpretation" of its award, the impeachment petition should be denied; on the other hand, if the board's answer is "entirely inconsistent with any conceivable interpretation" of its award so as to constitute an "amendment" of the award or a "new award," the impeachment petition should be granted and the answer set aside. It should be noted that, for purposes of determining the validity of a ruling interpreting an award, the award includes prior unimpeached rulings or answers by the arbitration board. As is pointed out at pp. 11-12 above, Sections 7 Third (c) and 8(m) of the Railway Labor Act expressly provide that the board's rulings are to be filed in the same court "as the original award and become a part thereof."

Since the *New York Central* and *Mid-Continent* cases were decided prior to the enactment of P.L. 88-108 and there are no contrary decisions, we think it fair to assume that the Congress intended to permit the same limited review of answers by Board 282 in impeachment proceedings, such as that now before this Court, brought under Section 9 of the Railway Labor Act as incorporated into Section 4 of P.L. 88-108.

In applying this standard of review, it should be kept in mind that "the merits of the decision [by an arbitration board] are obviously not subject to judicial review" in a Section 9 proceeding. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co., supra*, 225 F. Supp. at 17.[5] More-

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[5] Accord, *Brotherhood of Railroad Trainmen* v. *Chicago, M. St. P. & P. R. Co.*, 237 F. Supp. 404, 425 (D. D.C., 1964), remanded on other grounds,

over, the validity of the award as originally issued and as supplemented by rulings on prior questions which have become a part thereof is not subject to attack in a petition to impeach a ruling by the reconvened board. If an impeachment petition is not filed within 10 days after the award is filed with the District Court, the District Court enters a judgment upon the award "which shall be final and conclusive on the parties." 45 U.S.C. § 159 Second. And, of course, when a proceeding to impeach the original award has been brought such as occurred with respect to the Award by Board 282, the judgment upholding the award is *res judicata* on all issues as to the validity of that award whether or not raised in such impeachment proceeding. *Brotherhood of Railroad Trainmen* v. *Missouri Pacific R. Co.*, 230 F. Supp. 197, 201 (E. D. Mo., 1964); see, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); *Heiser* v. *Woodruff*, 327 U.S. 726, 735-736 (1946). Finally, Section 9 Third (c) of the Railway Labor Act provides that "an award contested as herein provided shall be construed liberally by the Court, with a view to favoring its validity," and that "no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance." We see no reason why those requirements should not equally apply to rulings by a reconvened board of arbitration upon the meaning or application of its award, when impeachment of such rulings is sought pursuant to Section 9.

Applying these principles, we do not believe that there can be any reasonable doubt as to the validity of the answer by Board 282 to BRT Question No. 47, in issue here. That answer plainly constitutes a permissible interpreta-

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120 U.S. App. D.C. 295, 345 F. 2d 985 (1965). Section 9 expressly provides that an award by an arbitration board "shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration . . ." 45 U.S.C. §159 Second.

tion of the Board's Award as originally issued and as supplemented by prior answers, rather than an amendment thereto. Indeed, we think the answer by the Board is so obviously correct that it should and would be upheld under any conceivable standards of review. Our reasons for these conclusions are set forth below.

B. *The Ruling that Sections 7 and 8 of the Railway Labor Act Do Not Apply to the Special Boards of Adjustment Is a Permissible Interpretation of the Award.*

The BRT did not, either in its Question No. 47 submitted to Board 282 or in this Court, contest the merits of the special board award obtained by the carrier. Rather, the Brotherhood's principal contention is that Board 282 erred in ruling that its Award did not subject the special boards of adjustment to the requirements of Sections 7 and 8 of the Railway Labor Act. When this issue was here before, this Court stated "that Board 282 is more familiar than we can be with respect to the Board's instructions when the Special Boards of Adjustment were convened" and held that the District Court should permit the parties to submit the issue to Board 282 for its views on "whether or not the Special Boards of Adjustment had been required to conduct the arbitrations in compliance with sections 7 and 8 of the Railway Labor Act. . . ." See p. 11, *supra*. The Court now has the benefit of the views of the Board. From its familiarity with the Award, the Board could state flatly "that it was never our intention that the special boards of adjustment for which we have provided would be subject to Sections 7 and 8 of the Railway Labor Act," and explain in detail its reasons in that regard including the impracticability of subjecting the special boards to the requirements of Sections 7 and 8. See pp. 5-6, *supra*.

We do not believe that there is any basis for contending

that the Board's ruling is so "entirely inconsistent with any conceivable interpretation" of the Award as to constitute an "amendment" of the Award rather than a "permissible interpretation" of the Award. Indeed, we believe that the ruling constitutes the only "conceivable interpretation" of the Award. The BRT has not referred the Court to any language in the Award which might be interpreted as requiring the special boards to follow the Sections 7 and 8 procedures, and there is none for, as the Board remarked (J.A. 68), "the omission . . . was deliberate. . . ."

In addition to omitting any language which might be interpreted as requiring the special boards to follow the Sections 7 and 8 procedures, the Award contains several provisions that are inconsistent with provisions of Sections 7 and 8, as the Board also noted (J.A. 67-68). The Award limits the special boards to three members (J.A. 55); Section 7 First of the Railway Labor Act permits the parties to agree upon either three or six members. The Award allows the partisan members ten days after selection of the second partisan member in which to select the neutral member (J.A. 55); Section 7 Second of the Railway Labor Act allows the partisan members five or fifteen days after their first meeting in which to select the neutral member or members. The Award provides that the fees and expenses of the neutral member and other incidental expenses shall be shared equally by the parties (J.A. 56); Section 7 Third (c) of the Railway Labor Act provides for payment by the National Mediation Board of such fees and expenses. And, of course, Section 7 First of the Act requires an agreement to arbitrate the terms of which are specified in detail by Section 8 of the Act, while Section III-B(1) of the Award (J.A. 55) permits "either party" to refer a dispute to a special board of adjustment without requiring an agreement of any kind.

In short, there never has been any basis for substantial doubt about the fact that the Award did not subject the special boards to the requirements of Sections 7 and 8. This is confirmed by the fact, pointed out by Judge Holtzoff in an opinion below (see p. 7, *supra*), that "practically all of these special boards proceeded in the same manner" in disregard of Sections 7 and 8, not just the special board involved in BRT Question No. 47. Such unanimity of approach could hardly have occurred if there was any substantial doubt about the matter and certainly could not have occurred if the Board's answers to BRT Questions No. 36(B)(1) and 47 were so inconceivable or far fetched as to constitute an amendment rather than an interpretation of its Award.

The Brotherhood contends (Brief, at 15-18), however, that the Board's ruling is not consistent with its earlier response to BRT Question No. 21. The strength of the Brotherhood's belief in the validity of this contention may perhaps be measured by the fact that it did not raise the contention below and, indeed, did not even include BRT Question No. 21 and the response thereto in the record certified to this Court in connection with these appeals.[6] But however that may be, the response to BRT Question

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[6] The quotation of BRT Question No. 21, on page 15 of Appellant's Brief, is inaccurate. The Question reads as follows:

> "Is our understanding correct that special boards of adjustment established pursuant to the Award of Arbitration Board 282, Section III, Part B, having no procedure stipulated by agreement, *or by any provision of the Award*, must therefore conduct their arbitration pursuant to Sections 7 and 8 of the Railway Labor Act, to the extent that said Sections are not inconsistent with Public Law 88-108, and that the awards of those special boards are subject to Section 9 of the Railway Labor Act?"

The words which we have emphasized were omitted from Appellant's quotation. See Interpretations of Arbitration Board No. 282, dated September 16, 1964, at p. 12. The Board's response to BRT Question No. 21 is correctly quoted at page 17 of Appellant's Brief.

No. 21 does not in any way conflict with the rulings in answer to BRT Questions No. 36 and 47 that the Award did not subject the special boards to the requirements of Sections 7 and 8 of the Railway Labor Act.

BRT Question No. 21 did raise the issue as to whether the special boards "must conduct their arbitration pursuant to Sections 7 and 8 of the Railway Labor Act. . . ." Board 282 responded to that question after Judge Holtzoff had ruled that Sections 7 and 8 "are not applicable to the special boards of adjustment" in an opinion[7] which was subsequently before this Court in *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc., supra*, but before this Court vacated the order by Judge Holtzoff in that case for the purpose of permitting Board 282 to first determine the issue. See p. 12, *supra*. In its response to BRT Question No. 21, therefore, the Board stated that it "decline[d] to answer this question and refer[red] the parties to the holdings on this question by Judge Holtzoff as stated in his Opinion issued June 8, 1964, in . . . Miscellaneous No. 41-63 . . . in the United States District Court for the District of Columbia."

Obviously, Board 282 considered that an answer by it to BRT Question No. 21 would be inappropriate since the District Court had determined the issue posed by the question without awaiting a ruling by the Board. Hence, it *declined* to answer the question and merely referred the parties to the opinion by Judge Holtzoff deciding the issue posed by the question. Since this Court subsequently vacated that aspect of Judge Holtzoff's decision because the issue should first be decided by the Board and remanded the case for that very purpose, there is no inconsistency in the fact that the Board then decided the issue in answer

[7] *In re Certain Carriers, Etc.*, 231 F. Supp. 519, 521 (D. D.C., 1964), remanded, 121 U.S. App. D.C. 230, 349 F. 2d 207 (1965).

to BRT Question No. 36 and followed that decision in answering BRT Question No. 47. In so doing, the Board quite properly deferred to the latest expression of the views of the courts, just as it had done in declining to answer BRT Question No. 21.

It seems apparent that Board 282, in declining to answer BRT Question No. 21 because Judge Holtzoff had already ruled upon the issue as to whether the specal boards "must conduct their arbitration pursuant to Sections 7 and 8 of the Railway Labor Act," did not thereby adopt the decision by Judge Holtzoff on that issue and thus answer by reference the question which it stated it declined to answer. But even if the Board's explicit refusal to answer could somehow be said to constitute an adoption of the decision by Judge Holtzoff, there would be no inconsistency between that action and the Board's rulings in answer to BRT Questions No. 36 and 47. In the opinion by Judge Holtzoff to which the Board referred in its response to BRT Question No. 21, he stated, among other things, the following:

> "It is then claimed that the [special] boards did not follow the prescribed procedure, and that, therefore, the awards should be set aside. This contention is predicated on the major premise that the provisions of the Railway Labor Act governing the procedure of an arbitration board are applicable to these local adjustment boards. To be sure, the provisions of the Railway Labor Act, found in 45 U.S.C. §§ 158, 159 [sic], were binding on the special Board of Arbitration created by the Act of Congress, and those provisions were complied with. The Court is of the opinion, however, that they are not applicable to the special boards of adjustment created under the award."

In re Certain Carriers, Etc., supra, 231 F.Supp. at 521.

Consequently, Judge Holtzoff merely anticipated the Board's later ruling in answer to BRT Question No. 36 that the special boards are not subject to the requirements of Sections 7 and 8, insofar as his opinon decided the issue posed in BRT Question No. 21. And surely there is no basis whatever for assuming that the Board, in refusing to answer BRT Question No. 21 and referring the parties to the opinion by Judge Holtzoff, intended to adopt every word in that opinion including comments on issues not raised by Question No. 21 such as the suggestion by Judge Holtzoff that the procedures followed by the National Railroad Adjustment Board under Section 3 of the Railway Labor Act could be applied by analogy to the special boards created under the Award.[8]

The other contentions made by the Brotherhood in its Brief are even less substantial.

The BRT contends (Brief, at 19-22) that the Award as interpreted by the Board in answer to BRT Question No. 36 is contrary to the provision of Section 4 of P.L. 88-108 that: "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act . . . ." This contention going to the validity of the Award should have been made, if at all, in the prior proceeding to impeach the Award, and is barred by the judgment in that proceeding upholding the validity of the Award. See p. 15, *supra*. Indeed, the BRT and the other unions did contend in that proceeding that Board 282 "lacked authority to require

[8] Neither BRT Question No. 21, BRT Question No. 36 nor BRT Question No. 47 raised an issue as to what procedures were to be utilized by the special boards if the Award did not subject the special boards to the requirements of Sections 7 and 8 of the Railway Labor Act. The Board, of course, cannot consider any "question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing. . . ." 45 U.S.C. §157 Third (c).

the parties to bear the expenses of neutral members of the local adjustment boards," which contention was rejected by the courts. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, *supra*, 225 F. Supp. at 21. If Sections 7 and 8 of the Railway Labor Act had been deemed to be applicable to the special boards of adjustment by reason of Section 4 of P.L. 88-108, a contrary result would have been required as Section 7 Third (e) of the Act provides that the compensation and expenses of neutral members of arbitration boards coming under Sections 7 and 8 shall be paid by the National Mediation Board. In any event, the above quoted language of Section 4 of P.L. 88-108 plainly refers to arbitration by "the arbitration board of seven members" established by Section 2 of the Joint Resolution, *i.e.*, to the proceedings of Board 282, which have been conducted in accordance with Sections 7 and 8 insofar as those sections are not inconsistent with P.L. 88-108. The Board so stated in its Preliminary Statement (J.A. 68), and this also is the view of the court below (see pp. 20-21, *supra*).

The BRT contends also (Brief, at 19-22) that this Court held, in *Brotherhood of Railroad Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 120 U.S. App. D.C. 295, 345 F. 2d 985 (1965), that awards by special boards of adjustment may be reviewed by the courts under Section 9 of the Railway Labor Act, thereby implying that the special boards are subject to Section 7 and 8 of that Act. But in fact this Court there held that Board 282 "has review jurisdiction of the special boards of adjustment" under Sections 7 Third (c) and 8(m) of the Railway Labor Act, rather than the courts under Section 9 of that Act. *Id.*, at 987. One reason given for this holding was that, unless Board 282 had jurisdiction to review the special board awards, they would not be subject to "any meaningful review." *Ibid.* Plainly, therefore, this Court in the *Milwaukee* case did not deem Section 9 to apply directly to the special boards and their awards.

What the courts may review under Section 9 are the rulings of Board 282 with respect to special board awards, not the awards themselves, and this Court accordingly directed in its *Milwaukee* opinion that the issues as to the validity of certain special board awards there involved be submitted to Board 282 instead of decided by the courts. Thus, this Court subsequently relied upon its opinion and decision in the *Milwaukee* case as authority for holding that Board 282 had primary jurisdiction to determine whether the Award subjected the special boards to the requirements of Sections 7 and 8. *Brotherhood of Railroad Trainmen v. Certain Carriers, Etc.*, 121 U.S. App. D.C. 230, 349 F. 2d 207, 210 (1965). See p. 12, *supra*. Certainly, if this Court had deemed its *Milwaukee* opinion to establish that Sections 7 and 8 do apply to the proceedings of the special boards, as the BRT now contends, it would not have remitted the parties to Board 282 for a determination of that issue.

The BRT next contends (Brief, at 22-32) that the court below erred in upholding the ruling of the Board in answer to BRT Question No. 36 because "meaningful review" of the special board awards is not possible unless the Award subjects the special boards to the requirement in Section 7 Third (f) of the Railway Labor Act that a board of arbitration shall transmit its award, the papers and proceedings "and a transcript of the evidence at the hearings" to the clerk of the federal district court "for the district wherein the controversy arose or the arbitration is entered into" and to the National Mediation Board. Indeed, the BRT goes so far as to contend (Brief, at 33-36) that the failure of the Award to require the making of a transcript of the evidence in accordance with Section 7 Third (f) deprives the Brotherhood of due process of law in violation of the Fifth Amendment to the Constitution.

Once again, these are contentions that go to the validity of the Award which should have been made, if at all, in the

prior proceeding to impeach the Award, so that the judgment upholding the Award is *res judicata* with respect to such contentions. See p. 15, *supra*. If nothing in the Award as originally issued even arguably subjected the special boards to Sections 7 and 8 of the Railway Labor Act as we have demonstrated (pp. 16-18, *supra*), certainly there is no basis whatsoever for a belief that the Board in its Award nevertheless intended Section 7 Third (f) to apply to the special boards either in whole or in part, and the BRT has not pointed to any language in the Award justifying an assumption on its part that the Award did subject the special boards to the requirements of Section 7 Third (f).

But in any event and with all deference, we submit that the contentions by the BRT in this regard are patently untenable. Even if a transcript of the evidence before the special boards should be necessary for "meaningful review," the fact that the Award does not subject the special boards to the requirements of Section 7 Third (f) in particular, or to the requirements of Sections 7 and 8 in general, did not prevent the BRT from obtaining such a transcript. As was stated by the Board in its Preliminary Statement (J.A. 71), ". . . a party wishing review of a decision by a special board must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary, the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost." In short, to the extent that the BRT may have been deprived of a transcript of evidence before the special boards, this deprivation was due to its own obstinate refusal to pay for the cost of a transcript, rather than by anything in the Award as interpreted by Board 282.

This argument by the BRT, consequently, boils down to the proposition that it has a right under P.L. 88-108 and the Due Process Clause of the Constitution to a *free* transcript of the special board proceedings. Insofar as P.L. 88-108 is concerned, this argument is dependent upon the contention that Section 4 of the Joint Resolution, in requiring Board 282 to conduct its arbitration insofar as possible pursuant to Sections 7 and 8 of the Railway Labor Act, also subjected the special boards to the requirements of Sections 7 and 8. We have shown, pp. 21-22, *supra*, that that contention is erroneous. The BRT does not claim that any other provision of P.L. 88-108, either expressly or impliedly as shown by its legislative history, subjects the special boards to Section 7 Third (f) of the Railway Labor Act or otherwise requires them to provide the parties with a free transcript of the proceedings.

The contention that the BRT has a constitutional right under the Due Process Clause to a free transcript is, if anything, even more frivolous. Possibly, there might be some basis for such a contention if the BRT were a pauper. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 11 (1956). But the BRT does not even claim to be pauper and thus unable to pay for a transcript. In the federal district courts, a party is entitled to a transcript of a proceeding only when he has "request[ed]" a transcript to be made by the Court Reporter and "has agreed to pay the fee therefor . . . ," 28 U.S.C. § 753(b), unless he is a pauper or a transcript is ordered by the court. While Court Reporters are now provided pursuant to 28 U.S.C. § 753, that was not always true and prior to the enactment of that statute a party who desired a transcript had to see that a stenographer was present as well as pay for the transcript. *Coulston* v. *United States*, 51 F. 2d 178, 180 (10th Cir., 1931). It has never been suggested that the requirement of payment for

transcripts by non-pauper parties in federal litigation is unconstitutional, and we submit that a similar requirement of payment for transcripts of special board proceedings under Award 282 is equally constitutional.[9] *Brotherhood of Railroad Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 237 F. Supp. 404, 423 (D. D.C., 1964), remanded on other grounds, 120 U.S. App. D. C. 295, 345 F. 2d 985 (1965). See *Petition of Brink*, 98 F. Supp. 135, 137 (E.D.N.Y., 1951), aff'd, 193 F. 2d 1009 (2d Cir., 1952). Indeed it is recognized that a party to an arbitration proceeding has no right of any kind to a transcript of the proceedings, absent a statutory requirement or agreement to the contrary.

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[9] The cases relied upon by the BRT (Brief, at 34-35) are not to the contrary. *Washington Terminal Co.* v. *Boswell*, 75 U.S. App. D.C. 1, 124 F. 2d 235 (1941), aff'd by an equally divided Court, 319 U.S. 732 (1943), held that the Railway Labor Act precluded an action under the Declaratory Judgment Act to review the validity of an award by the National Railroad Adjustment Board under Section 3 of the RLA. While to be sure this Court in that case considered "questions as to the constitutional validity of such a denial" as the BRT asserts (Brief, at 34), the BRT neglected to mention that the constitutionality of the "denial" was upheld (135 F. 2d, at 244-250). The District Court opinion in the *Milwaukee* case contradicts, rather than supports, the BRT's argument, as the Court expressly rejected a contention by the BRT that it was deprived of due process by the refusal of the special board there concerned to provide a transcript of its proceedings unless "the organization bore the expense." 237 F. Supp., at 423. In remanding the case with instructions to dismiss the BRT's complaint without prejudice to its right to apply to Board 282, this Court did not even mention the requirement that the BRT pay for a transcript as being one of the issues. See 345 F. 2d at 986. *Kent* v. *United States*, 383 U.S. 541 (1966), held that an order by the D.C. Juvenile Court waiving jurisdiction of a juvenile violated the Juvenile Court Act under the circumstances there involved. The passage in the Supreme Court's opinion quoted by the BRT (Brief, at 35), prefaced holdings that "it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor," and "that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order." 383 U.S., at 561. The Court did not suggest that a transcript of such an "informal" hearing had to be made available even if the juvenile was willing to pay for it, much less that he had a right to a free transcript even though not a pauper.

Bernhard v. *Polygraphic Co.*, 350 U.S. 198, 203-204, fn. 4 (1956); *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359, 362 (S.D.N.Y., 1957).

We submit, therefore, that the ruling by Board 282 in answer to BRT Question No. 36, followed in its answer to BRT Question No. 47, clearly accords with the Constitution, with P.L. 88-108 and with the Board's Award. Certainly, there is no basis for holding that the Board's interpretation of its Award as not subjecting the special boards of adjustment to the requirements of Section 7 and 8 of the Railway Labor Act is not a "permissible interpretation" of the Award but is so "inconsistent with any conceivable interpretation" of the Award as to constitute an "amendment" thereto or a "new award." As we have demonstrated at pp. 11-16, *supra*, the Board's ruling is not subject to impeachment in such circumstances.

C. *The Answer to BRT Question No. 47 Is Not Subject to Impeachment for Refusing to Invalidate the Award of the Special Board of Adjustment Merely Because other Special Board Awards and Crew-Consist Agreements Were Considered.*

There is no substance whatsoever in the Brotherhood's arguments based upon the consideration by the special board of adjustment of certain special board awards and crew-consist agreements, made pursuant to Section III of Award 282, relating to other carriers. The awards and agreements in question were considered merely for whatever value they might have as precedents illustrating how others had applied the guidelines prescribed by Award 282 (J.A. 56-58) in similar circumstances. The special board received extensive evidence in the form of written submissions of the parties, exhibits and oral testimony, made on the ground observations of some of the actual operations

and territory involved, and made its award in accordance with the guidelines upon the basis of all the relevant evidence. The BRT, as well as the carrier, relied upon the other special board awards as precedents. See pp. 3-4, *supra*. There is no reason why a special board of adjustment may not consider precedents urged by the parties in applying the applicable law (the guidelines) to the facts before it, just as the courts do day after day. As Judge Holtzoff remarked in his opinion (J.A. 91), there "is nothing unreasonable or basically wrong in considering what has been done in other similar cases." Certainly, nothing in the guidelines or in any other provision of Award 282 purports to prohibit such consideration, and the answer to BRT Question No. 47 plainly is not an arbitrary or impermissible interpretation of the Award in refusing to invalidate a special board award for that reason.

Affidavits filed by the parties in the Court below are in dispute as to whether the BRT objected at all to consideration of the other special board awards and crew-consist agreements. Even the BRT concedes, however, that the awards were marked as a Joint Exhibit, that this was done because they were not "truly partisan in nature," and that at most any objection on its part extended to use of the awards as "evidence." See pp. 3-4, *supra*. Not only was this material used for its precedential value, rather than as "evidence" in any true sense, but as Judge Holtzoff noted "it must be borne in mind that the common law rules of evidence are not binding and do not apply to proceedings before Arbitration Boards" (J.A. 91). See *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359, 362 (S.D.N.Y., 1957), and cases there cited. And as Board 282 pointed out in its Preliminary Statement (J.A. 70, 71), a party seeking review by the Board of a special board award is obliged "to make such review possible by

filing a timely objection to the proceedings and by providing us with an adequate record" and thus "must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board." Most appellate courts require a party who wishes to raise an issue upon appeal to provide a record showing that the issue was raised in the trial tribunal. See, *e.g.*, 4A C.J.S., Appeal and Error, §§ 709, 712, and the many cases there cited. The BRT did not provide Board 282 with a transcript or any other "evidence" of the proceedings before the special board (see J.A. 7-31)—not even an affidavit such as that filed with the court below—purporting to show that it objected to consideration of the other special board awards and crew-consist agreements. If the BRT did make any objections relating to these matters below and intended to have such objections reviewed by Board 282, it should have ordered a transcript made of the proceedings below—as it could have done—or otherwise arranged to preserve a record of the occurrences before the special board. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952).

The BRT urges (Brief, at 39) that none of the guidelines specified in Award 282 authorizes a special board of adjustment to consider other special board awards or crew-consist agreements. Neither do the guidelines "authorize" the special boards to consider oral testimony or any other form of evidence, if taken literally. They simply specify the standards to be applied by the special boards in reaching their decisions on the basis of whatever evidence and other material may be before them. As Judge Holtzoff noted (J.A. 91), there is nothing in the guidelines which purports to prevent a special board "from weighing what has been done in other similar cases."

The ruling by Board 282 in answer to BRT Question No.

47, under these circumstances, plainly is not so unreasonable or inconceivable as to constitute an amendment of its Award rather than an interpretation of its Award. Indeed, any other ruling would have been unreasonable in our opinion.

Conclusion

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

Public Law 88-108, 77 Stat. 132

Sec. 1. No carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and

appropriate in carrying out the purposes of this joint resolution.

Sec. 3. * * * The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Section 7 of the Railway Labor Act, 44 Stat. 582, as amended, 45 U.S.C. § 157

Sec. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators, within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necessary arbitrators, within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however*, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representatives as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award,

the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and became a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearing, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however*, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Com-

merce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the Board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be determined by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts

of the United States, to be paid by the party securing the subpoena.

Section 8 of the Railway Labor Act, 44 Stat. 584, as amended, 45 U.S.C. § 158

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signature of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of any award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however*, That such agreement to arbitrate may at any time be revoked and cancelled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

BRIEF FOR APPELLEE RALPH T. SEWARD,
CHAIRMAN OF ARBITRATION BOARD NO. 282

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20212 and 20213

BROTHERHOOD OF RAILROAD TRAINMEN,

Appellant

v.

ST. LOUIS SOUTHWESTERN RAILROAD COMPANY,

Appellee

BROTHERHOOD OF RAILROAD TRAINMEN,

Appellant

v.

ST. LOUIS SOUTHWESTERN RAILROAD COMPANY and RALPH T. SEWARD,

Appellees

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. DOUGLAS,
Assistant Attorney General,

DAVID G. BRESS,
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee Ralph T. Seward, Chairman of Arbitration Board No. 282, the questions presented are:

1. Whether Arbitration Board 282 reasonably interpreted its own Award in determining that the Special Boards of Adjustment created under that Award were not required to comply with the provisions of Sections 7 and 8 of the Railway Labor Act in settling the "crew consist" issue on a local basis.

2. Whether prior judicial approval of the Award of Board 282, which contained provisions establishing procedures for the Special Boards of Adjustment inconsistent with the procedures of Sections 7 and 8 of the Railway Labor Act, bars this attack on the failure of the Special Boards to follow Sections 7 and 8.

3. Whether Arbitration Board 282 reasonably interpreted its own Award in determining that the Special Board could base its award partly upon awards of other special boards created under the Award.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD NO. 282

COUNTERSTATEMENT OF THE CASE

This appeal is taken from an Order of April 22, 1966, denying Petitions by the Brotherhood of Railroad Trainmen to Impeach and Contest Certain Rulings of Arbitration Board 282 (JA 92).

The present proceedings arise out of a lengthy dispute between the railroads and their unions regarding the abolition of

firemen's jobs and the consist of crews in road and yard service, which culminated in the enactment of Public Law 88-108 and the Award by Arbitration Board 282 under that law. The validity of Public Law 88-108 and the Award were upheld in Brotherhood of L.F. & E. v. Chicago, R. & I. R. Co., 225 F. Supp. 11 (D.D.C.), affirmed, 118 U.S.App.D.C. 100, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918.

Section III of that Award deals with the consist of road and yard crews, other than engine service (JA 53-59). Essentially the Award provided for final disposition of the "crew consist" issue on a local basis. If the union and railroad could not agree upon the issue, then it was to be referred to a Special Board of Adjustment. The union and railroad were each to name one member of the special board, and the two partisan members were to name a third. If they could not agree on the third member, he was to be named by the National Mediation Board (JA 55). The decision of the majority of any special board was to be binding on both parties (JA 56).

The Award also set forth in detail the standards and considerations upon the special boards were to use as guidelines in making their binding dispositions. The special boards were to weigh various factors such as assurance of adequate safety, avoidance of unreasonable burden or workload on members of the crew, changes in operating conditions, physical characteristics of the line to be traversed, and the number of highway crossings to be protected (JA 56-58).

On January 10, 1964, the district court upheld the validity of the Award, and on February 20, 1964, this Court affirmed its decision. On February 25, 1964, the St. Louis Southwestern Railroad served a notice of proposed changes in rules governing crew consists on the BRT, and subsequently the BRT served counter-proposals on the railroad. Several conferences were held without agreement being reached (JA 19).

Thereafter, in accordance with the terms of the Award, a special board of adjustment was convened. By letter of May 26, 1964, the neutral member of the Special Board advised the other members that the hearing would commence on June 15, 1964 (JA 23). On June 10, 1964, the union member of the Special Board wrote the neutral member that the BRT objected to the Special Board starting the hearing

> except and unless proceedings of the Board are handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make transcript of all proceedings and take evidence under oath and mark all exhibits with a number and enter them in evidence. (JA 28).

This position was rejected by the other members of the Special Board (JA 29, 42). The BRT then requested that it be furnished a copy of the carrier's written submission (JA 29-30), which request was complied with (JA 42-43, 49). 1/

At the start of the hearing, the BRT member repeated the request that a court reporter be obtained. The neutral member

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1/ Also granted were the BRT's requests that testimony be taken under oath, and that meetings of the Special Board be held in a public building, rather than on the carrier's premises (JA 28, 43).

told each party that it could arrange to have a court reporter make a transcript of the proceedings if it so desired. Neither the carrier nor the BRT made such an arrangement (JA 42).

During the hearings, the carrier presented several awards of Special Boards of Adjustment which settled the crew consist issue on other railroads, and also an agreement reached by the BRT and one carrier on the subject. These awards were marked as "Joint Exhibits." (JA -3, -9'. The BRT member of the Special Board contends, however, that he objected to the Board "considering the Awards of Boards on other Railroads as any evidence" in the present matter (JA -9-51). The Carrier member contended that the BRT member acquiesced in the consideration of the awards of other special boards, and indeed referred to them himself (JA -1---, 52-53).

On July 1-, 196-, the Special Board, with the BRT member dissenting, rendered its award sustaining the Carrier's proposal to reduce crew consists, and denying the BRT's proposal to increase crew consists. The Board stated that its decision was made on "the basis of all the relevant evidence submitted by the parties, including awards of other Special Boards...., and extensive on-the-ground observation (covering a significant part of the affected territory and including observation of a considerable amount of actual operations)" (JA 30-31).

Thereafter, the BRT submitted its question 47 to Arbitration Board No. 282. The BRT questioned the validity of the Award of the Special Board on essentially two grounds (JA 77-78): 1) The

Board had not made a transcript of the proceedings, as requested by the BRT, and thus had not complied with Section 7 of the Railway Labor Act; 2) the Board had relied partly upon awards of other special boards, and upon an agreement on another railroad.

On January 16, 1966, Arbitration Board 282 ruled that (JA 78):

> There is no basis for concluding that the Award of the Special Board of Adjustment is invalid for the reasons referred to in the question. See the Board's Preliminary Statement and its answers to BRT Questions 32, 33 and 36 [See JA 60-76].

The BRT filed Petitions to Impeach and Contest this ruling of Arbitration Board 282 (JA 2-6). After a hearing (JA 79-89), the district court sustained the rulings of the Board in all respects (JA 89-91). Judge Holtzoff stated that the question of whether the Special Board was required to follow Sections 7 and 8 of the Railway Labor Act had been decided against the BRT in In re Certain Carriers, 248 F. Supp. 1008 (D.D.C.), appeal pending, Nos. 19867, 20003, 20004, and that "there is nothing unreasonable or basically wrong in [the Special Board's] considering what has been done in other similar cases" (JA 91).

STATUTES INVOLVED

Public Law 88-108 and relevant portions of the Railway Labor Act, 45 U.S.C. 151, et seq., are reproduced in the Appendix to this brief.

SUMMARY OF ARGUMENT

The principal question on appeal is whether Arbitration Board 282 reasonably interpreted its own Award in determining that Special Board of Adjustment created under that Award were not required to comply with the provisions of §§ 7 and 8 of the Railway Labor Act in settling the "crew consist" issue on a local basis. This same question is involved in Nos. 19867, 20003, and 20004.

The main difference between the present case and Nos. 19867, 20003, and 20004, is that here the BRT did participate in the proceedings before the Special Board, and did object to the Special Board proceeding in a manner contrary to § 7 of the Railway Labor Act. 2/ Specifically, on appeal the BRT complains that the Special Board failed to follow § 7 of the Railway Labor Act because it did not make a transcript of the testimony and the evidence before it. This, the BRT contends, deprives it of "meaningful review" of the Award of the Special Board.

Of course, the real question here is not whether the BRT was entitled to have a transcript. The Special Board did allow the BRT (or the carrier) to make a transcript of the proceedings, which the BRT chose not to do, but at its own cost. Thus, the question is essentially whether the Special Board was obligated to make a

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2/ Thus, the present case unlike Nos. 19867, 20003, 20004, does not involve the question of whether the BRT is precluded from attacking the procedures followed by the Special Board by its failure to present its objections to the Board.

transcript on its own, and charge the cost of the transcript to the National Mediation Board, as an Arbitration Board acting under § 7 of the Railway Labor Act, would do. See 45 U.S.C. 157 ((e)-(g)), infra, pp. 6a-7a.

The answer of Board 282 to Question 36 (JA 61-76), 3/ which rejects the BRT's contentions, is plainly correct. There is nothing in the Award of Board 282 to suggest that the provisions of §§ 7 and 8 of the Railway Labor Act were to be followed by the Special Boards, and Board 282 has stated that the omission was deliberate (JA 68).

The Special Board convened in this case, as well as all the Special Boards involved in Nos. 19867, 20003, and 20004, and all other Special Boards, as far as we know, have understood that they were not required to follow the procedures of §§ 7 and 8. Indeed, this was clear from the terms of the judicially approved Award, which, as Board 282 pointed out, specifies certain procedures to be followed by the Special Boards which are unquestionably inconsistent with the procedures set forth in §§ 7 and 8 (JA 67-68). Because it was clear from the terms of the Award, that the Special Boards would not adhere to §§ 7 and 8, the BRT could have questioned this aspect of the Award in Brotherhood of L.F. & E. v. Chicago, B. & Q. R. Co., supra. The decision in that case upholding the validity of the Award therefore bars the present collateral attack on the Award.

3/ In its answer to BRT's Question 47, which is attacked in this suit, Board 282 referred to its earlier answer to Question 36 (JA 78).

Also without merit is BRT's contention that it is deprived of 'meaningful review' of the Special Board's decision because the Board did not, sua sponte, make and file with Board 282, formal records and transcripts of testimony, but merely permitted the parties to do so themselves. This contention is based upon a misconception of the nature of the limited review of the determinations of the Special Boards. Arbitration Board 282 was manifestly correct in stating that (JA 76):

> The essential criterion is not whether there is substantial evidence to support the awards of the special boards of adjustment but rather whether there is substantial evidence to show that the special boards of adjustment failed to apply or to confine themselves to the guidelines prescribed by the Award of Board 282.

Finally, there is no merit to BRT's argument that the Special Board was required to shut its eyes and ignore how other Special Boards were settling similar problems.

ARGUMENT

> BOARD 282 INTERPRETED ITS OWN AWARD IN A REASONABLE MANNER IN DETERMINING THAT THE SPECIAL BOARDS OF ADJUSTMENT WERE NOT REQUIRED TO FOLLOW THE PROCEDURES OF SECTIONS 7 AND 8 OF THE RAILWAY LABOR ACT. THE PROCEDURES FOLLOWED BY THE SPECIAL BOARDS DO NOT DEPRIVE THE PARTIES OF A "MEANINGFUL REVIEW" OF THE AWARDS.

The Award of Board 282 set forth guidelines for local resolution of the crew consist issue by the special boards of adjustment. Additionally, it specified the manner of selecting the members of the special boards, the time limits in which the parties were to hold conferences and to name members of the Special

Boards, and in which those Boards were to render their decisions (60 days). It also prescribed the manner in which costs were to be apportioned, and the guidelines for decision (JA 56-58). The Award did not further specify the procedures to be followed by the special boards, nor did it refer to or incorporate the provisions of Sections 7 and 8 of the Railway Labor Act. This omission was deliberate (JA 68).

Moreover, it was an omission which was evident from the terms of the Award. This point was well explained in the answer of Arbitration Board 282 to Question 36 (JA 66-67):

> ... the procedures for the establishment and conduct of statutory arbitration boards under Section 7 of the Act were too cumbersome and formal for our purposes; moreover, by definition they depend for their establishment upon "agreement of the parties," which was obviously lacking in this case. Accordingly, the Board directed that crew consist disputes be submitted to special boards of adjustment, specially designed for the task, in accordance with those procedural requirements deemed necessary to insure a prompt, equitable, and final disposition of these controversies.
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> * * *
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> Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third (f) requires that the arbitration board shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements.

Board 282 further pointed out the sharp difference between its Award and Section 7 of the Act with regard to compensation of neutral arbitrators and sharing of costs (JA 67-68). Thus, as stated by the Board, both the terms of its Award and the circumstances of its making left "no doubt of the Board's intention in this regard" (JA 66). And, as noted before, every Special Board convened under the Award has understood that it was not bound to follow the procedures of Sections 7 and 8.

Nor does it appear that there was any way in which the Special Board could have complied with the BRT's request to make a transcript at the Board's expense. It does not appear that the special boards had funds for this purpose, and they were not empowered to impose such a liability on the Government." See, Brotherhood of L.F. & E. v. Chicago, B. & Q. R. Co., supra, 225 F. Supp. at 21. Therefore, the Special Boards were left with two practical alternatives, neither consistent with Section 7 of the Railway Labor Act: 1) make a transcript and require the union and railroad to share the expenses, or 2) let either party which desired to make a transcript, arrange to do so and bear the expenses. It is clear that the Special Boards could choose the latter course. Cf. Bernhardt v. Polygraphic Co., 350 U.S. 198, 204, n. 4.

Therefore, the BRT's contention that the procedures of Sections 7 and 8 of the Act were to be followed by the Special Boards is without merit. In the absence of express provisions of statute

or agreement specifying the procedures to be followed by arbitrators, no particular form of procedure was required. Bernhardt v. Polygraphic Co., 350 U.S. 198, 203-204. In such circumstances, the procedures are left to the arbitral body. John Wiley & Sons v. Livingston, 376 U.S. 543, 557-59.

Additionally, because it was apparent from the Award of Board 282 that the special boards would not follow the procedures of Sections 7 and 8 in many respects, the judicial decision upholding the validity of that Award bars the present attack on the failure of the Special Boards to do so. This is so, because the BRT, which was party to the action in which that Award was upheld, could have raised the very questions it now raises here. This suit is in substance another attack on the procedures prescribed by the Award, for if the statute or Constitution required the special boards to follow the procedures of Sections 7 and 8, the Award itself would be invalid. This Court's decision in Brotherhood of L.F. & E. v. Chicago, B. & Q. R. Co., supra, therefore is res judicata on the principal issue presented here, for the BRT could have raised the same question in that suit.

Indeed in that suit the BRT and other unions did unsuccessfully attack one of the procedures (for the sharing of costs of the neutral arbitrator) which is clearly inconsistent with Section 7, although not on that ground. 4/ Here BRT challenges

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4/ The BRT clearly is not correct in saying, as it did in Nos. 19,867, 20,003, 20,004 (Reply br. 14), that the BRT "could not have .. known prior to the time the Special Boards ... commenced their arbitration that they would not conduct it pursuant to .... Sections 7 and 8 of the Railway Labor Act."

the ruling that it must pay for a transcript if it desires one, on the theory it chose not to raise in the principal case. But "There is no better settled principle in the law than that a judgment for the merits in one suit is res judicata in another, where the parties and the subject matter are the same, not only as respects matter actually presented to sustain or defeat the right asserted but also as to any other available matter which might have been presented." Midessa Television Co. v. Motion Pictures for Television, Inc., 290 F. 2d 203 (C.A. 5), certiorari denied, 368 U.S. 827; accord, Calvin v. Calvin, 94 U.S.App.D.C. 42, 214 F. 2d 226 (C.A.D.C.); see also, Commissioner v. Sunnen, 333 U.S. 591, 597; Cromwell v. County of Sak, 94 U.S. 351, 352.

Next, the BRT contends that failure of the Special Board to follow Section 7, by not making, sua sponte, a transcript of testimony, deprives it of its right to meaningful review. In the first place, the Special Board ruling expressly permitted the BRT to arrange to have a transcript made for review purposes, if it wished to do so, and was willing to assume the expense (JA 42). At any rate, the decision of an arbitrator is not subject to review on the merits; it is at most subject to review to determine whether the arbitrator stayed within the Submission Agreement (in this case, the Award of Board 282). United States Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 598. Accord: Section 9, Railway Labor Act, 45 U.S.C. 159; Brotherhood of L.F. & E. v. Chicago, B. & Q. R. Co., supra, 225 F. Supp. at 18. Since no transcript of testimony is necessary

for such review, the BRT's contention is invalid. This point is well illustrated by the present case, for here we find the BRT, sans transcript, vigorously contending that the Special Board violated the guidelines of the Award by considering the Awards of other Special Boards.

This final contention by the BRT, however, is without merit. As the district judge stated (JA 88): "I do not think a Special Board was required to remain in ignorance of what other Special Boards were doing..." Inasmuch as all adjudicative bodies, whether courts, administrative agencies or arbitration boards, take note of the disposition of similar cases by other tribunals, it would have been astonishing if the Award of Board 282 was designed absolutely to preclude the Special Boards from so doing. Board 282 ruled that its Award did not require such an unusual result, and this interpretation of its own Award surely is at the very least reasonable.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

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August 1966

A P P E N D I X

APPENDIX

1. Public Law 88-108 provides:

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions: and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the disputed accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except

by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within then days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall,

in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: Provided, however, That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such

orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

Section 7, Railway Labor Act (45 U.S.C. 157):

§ 157. Arbitration.

First. Submission of controversy to arbitration.

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

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Third. Board of arbitration; organization; compensation; procedure.

(a) Notice of selection or failure to select arbitrators.

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure.

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: Provided, however, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered.

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to

arbitrate' to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators.

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses.

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies.

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: Provided, however, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) Compensation of assistants to board of arbitration; expenses; quarters

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoenas. May 20, 1926, c. 347, § 7, 44 Stat. 582; June 21, 1934, c. 691, § 7, 48 Stat. 1197.

Section 8, Railway Labor Act (45 U.S.C. 158):

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate--

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversay arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: Provided, however, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration. May 20, 1926, c. 347, § 8, 44 Stat. 584; June 21, 1934, c. 691, § 7, 48 Stat. 1197; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

Section 9, Railway Labor Act (45 U.S.C. 159):

§ 159. Award and judgment thereon; effect of chapter on individual employee--Filing of award

First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: Provided further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Effect of partial invalidity of award

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: Provided, however, That, if the parties shall agree thereto, and if such valid and invalid parts are separable , the court shall set aside the invalid part, and order judgment to stand as to the valid part.

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